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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SUWANNEE SWIFTY STORES, INC.,

Petitioner,

v.

GEORGIA LOTTERY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") err in affirming the United States District Court for the Middle District of Georgia's (hereinafter "District Court") incorrect application of the decision of *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990) in finding that payments and credits totaling $533,075.52, made by Suwannee Swifty Stores, Inc., Debtor-in-Possession (hereinafter "Suwannee Swifty" or "Petitioner"), post-bankruptcy and without Bankruptcy Court authorization, to the Georgia Lottery Corporation (hereinafter "GLC" or "Respondent") were not recoverable by the Bankruptcy Estate as 'unauthorized post-petition payments' under 11 U.S.C. § 549. The District Court had held that because of the fact that the payments were made 'voluntarily', albeit mistakenly, *Begier* required a finding that that act of making such payments established a 'conclusive presumption' that the funds paid to the GLC were subject to a state-law statutory trust in favor of the GLC and were not, therefore, property of the Bankruptcy Estate under 11 U.S.C. § 541(a)(7), or subject to the exclusive jurisdiction of the Federal Courts under 28 U.S.C. § 1334(e). The District Court found that *Begier* required such a finding notwithstanding: (i) the undisputed evidence conclusively established that the funds paid to the GLC were *not* proceeds of pre-petition lottery ticket sales by the Debtor, and not, in fact, trust funds under the applicable state statutory definition; (ii) that the debtor-in-possession which made the 'voluntary' payments owed no *state-law* fiduciary duty to the GLC with respect to the GLC's pre-petition, unsecured claim, but, rather owed a superceding *federal* fiduciary duty under the United States Bankruptcy Code (hereinafter "Code") to treat *all* holders of unsecured, pre-petition claims equally; and (iii) the improper payment amounted to a 'post-petition preference' to the GLC,

allowing the GLC to receive 88% of its pre-petition, unsecured claim, while other similarly-situated unsecured creditors would receive less than a 5% of their claims?

2. Did the Eleventh Circuit err in affirming the District Court's finding that the issues presented in this case were governed by, or analogous to, this Court's reasoning of *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990), and its progeny.

3. Did the Eleventh Circuit err in affirming the District Court's determination that funds paid by Suwannee Swifty to the GLC after the filing of the Bankruptcy Case, were trust funds where the uncontroverted evidence showed that such funds could not be traced to the receipt of money that would be subject to a statutory trust in favor of the GLC?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner, Suwanne Swifty Stores, Inc. (hereinafter "Suwannee Swifty" or "Petitioner") states that it is a nongovernmental corporation, and that there are no parent corporations or subsidiaries, conglomerates, affiliates, or any other publicly-held company that owns more than ten percent (10%) of its stock.

Suwannee Swifty states that it is a Debtor-in-Possession (hereinafter "DIP") under the United States Bankruptcy Code with an Official Committee of Creditors Holding Unsecured Claims appointed by the United States Trustee.

Respondent, Georgia Lottery Corporation (hereinafter "GLC" or "Respondent") is an entity created by statue under O.C.G.A. §§ 50-27-1 through 50-77-55, and is not an agency of the State of Georgia, but an instrumentality which was established as a separate and self-sufficient entity.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

On December 12, 1996, Debtor Suwannee Swifty Stores, Inc. filed its petition for voluntary relief under Chapter 11 of the United States Bankruptcy Code captioned as *In Re: Suwannee Swifty Stores, Inc.*, United States Bankruptcy Court, Middle District of Georgia, Thomasville Division, Case No. 96-60807. On December 11, 1998, Suwannee Swifty filed an adversary proceeding against the Georgia Lottery Corporation captioned *Suwannee Swifty Stores, Inc. v. Georgia Lottery Corp.*, United States Bankruptcy Court, Middle District of Georgia, Thomasville Division, Adversary Proceeding No. 98-6078, upon which this Petition is based.

On or about May 17, 2001, the Bankruptcy Court issued an Order and Memorandum Opinion upon cross-motions for summary judgment which denied Suwannee Swifty's Motion and granted the GLC's Motion which is cited at *Suwannee Swifty Stores, Inc. v. Georgia Lottery Corp.*, 266 B.R. 544 (Bkrtcy. M.D. Ga. 2001). On May 25, 2001, Suwannee Swifty filed its Notice of Appeal to the United States District Court for the Middle District of Georgia. On May 24, 2002, the District Court issued an Opinion and Order affirming the grant of the GLC's Motion for Summary Judgment, and the denial of Suwannee Swifty's Motion for Summary Judgment which was entered on the docket on June 3, 2002 cited as Case No. 6: 01-CV-53 (CDL) (M.D. Ga. 2002). On or about July 2, 2002, Suwannee Swifty filed its Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. On or about July 9, 2002 and pursuant to correspondence from the United States Court of Appeals for the Eleventh Circuit, the appeal to the Eleventh Circuit was docketed.

On April 28, 2003, the Eleventh Circuit issued an order affirming the District Court without published opinion which was entered as the judgment of the court at 67 Fed. App. 583, __ F.3d __ (11th Cir. 2003) (Table at Decisions without Reported Opinions).

On May 19, 2003, Suwannee Swifty filed its Petition for Rehearing En Banc which was subsequently denied on August 22, 2003. Petitioner now brings its cause before this Honorable Court.

STATEMENT OF JURISDICTION

Contrary to the result of the lower courts' decisions, Petitioner shows that the Bankruptcy Court maintained federal jurisdiction over the Bankruptcy Case pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157, and pursuant to a Blanket Order entered by the United States District Court for the Middle District of Georgia referring all bankruptcy cases to such Bankruptcy Courts.

The District Court maintained appellate jurisdiction over the appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a)(1), and Fed. R. Bank. P. 8001(a).

The Eleventh Circuit maintained appellate jurisdiction over the appeal from the District Court pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. §§ 1291 and 1294.

The Eleventh Circuit entered its opinion and order on April 28, 2003, and subsequently denied Petitioner's Petition for Rehearing En Banc on August 22, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, specifically 11 U.S.C. § 547, 11 U.S.C. § 549, and 28 U.S.C. § 959 are involved in this case. Section 549 is reprinted in the Appendix.

STATEMENT OF THE CASE

On December 12, 1996 (the "Petition Date"), Suwannee Swifty operated approximately 109 retail convenience stores in South Georgia and North Florida. Suwannee Swifty was a Georgia Lottery Retailer and sold Georgia Lottery Corporation (hereinafter "GLC") Instant Tickets to consumers at approximately 60 of its convenience stores in Georgia. It is undisputed that Instant Ticket cash proceeds were commingled with all other retail receipts in the cash drawers of registers in each convenience store. All receipts were deposited daily into a commingled store account and then swept into the Debtor's general, commingled operating account. Under Suwannee Swifty's Georgia Lottery Retailer Contract (hereinafter "Retailer Contract"), Instant Tickets were not required to be "settled" or accounted for by Suwannee Swifty until the Friday following 21 days after the Instant Tickets were "activated". Instant Tickets could be "activated" substantially after delivery and "confirmation" (of receipt) of such tickets by the Debtor. The GLC holds retailers to be financially responsible for payment of the cost of all Instant Tickets which have been delivered to the retailer. O.C.G.A. §§ 50-27-1, *et seq*.

On October 19, 1994, Suwannee Swifty entered into a Retailer Contract with the GLC for the sale of lottery tickets for Instant Ticket games in connection with the Georgia Lottery for Education Act (hereinafter "Act").[1]

The Retailer Rules and Regulations of the GLC's Policies and Procedures Manual (hereinafter "Manual") defines an "Instant Game" as "[a]ny Instant Ticket lottery game . . . offered for sale to the public, that is played by revealing a hidden play

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1. Suwannee Swifty continued as a Georgia Lottery Retailer, as a debtor-in-possession, after the filing of the Bankruptcy Case under a temporary, interim agreement with the GLC. The Retailer Contract was ultimately rejected in accordance with 11 U.S.C. § 365. All Instant Tickets sold after the bankruptcy have been paid or otherwise accounted for.

area from a ticket to display the Play Symbols", and an "Instant Ticket" is defined as a "[a] lottery Ticket evidencing participation in an Instant Game". Tickets evidencing Instant Games are hereinafter collectively referred to as "Instant Tickets".

During the time period in controversy, Instant Tickets were delivered to each retail store in packs having a nominal face value of $300.00 each (hereinafter "Pack"). An "Issued" Pack is defined as one that has been assigned and shipped to a specific retail store.

Upon receipt of a Pack of Instant Tickets at a specific retail store, each Pack of tickets is scanned into the store's 'on-line' inventory with the GLC and the retail store is required to change the status to of the Pack to "Confirmed". Confirmation by the store is absolute proof that the Pack was received, as ordered, by the retail store (hereinafter "Confirmed Pack").

Prior to the sale of individual Instant Tickets from a Confirmed Pack, the retail store would again scan the Pack into its activated on-line inventory with the GLC and change the status of the Pack to "Activated". Activated Instant Tickets from such a Pack may be sold to the public (hereinafter "Activated Pack").

An Activated Pack's status automatically changes to "Settled" on the earlier of twenty-one (21) days after Activation, or the date the retailer consciously makes a choice to manually settle a pack, whether or not all Instant Tickets in the Pack have been sold (hereinafter "Settlement Date"). The Manual defines "Settled Pack" as "[t]he status of the Pack of Tickets which enables the GLC to bill (or settle) the Retailer's account based upon a pre-determined formula or schedule."

Pursuant to the Act, Suwannee Swifty maintained a separate account (hereinafter "Georgia Lottery Settlement Account") which allowed the GLC to perform electronic fund sweeps on the Tuesday following the preceding fiscal week (Sunday 12:00 a.m. through Saturday 11:59 p.m.) (hereinafter Sweep Date")

for the amount of the Instant Tickets that settled during such fiscal week, less credits for returned Instant Tickets, Commissions, Validations, and other adjustments or payments due to the Retailer under the Act. The Retailer Contract required that Suwannee Swifty deposit cash proceeds from the sale of Instant Tickets into the Georgia Lottery Settlement Account no later than the next business day after the sale of such Instant Tickets to the public. *However*, Suwannee Swifty failed to make these daily deposits. Typically, Suwannee Swifty would not deposit funds into the Georgia Lottery Settlement Account until expressly advised by facsimile from the GLC of the amount of the Settlement Sum to be swept by the GLC on the next day.

All proceeds from the sale of Instant Tickets were placed in the cash register drawer of each Suwannee Swifty store where such monies were commingled with other cash receipts from the operation of the convenience store which were collected on that date, including sales of money orders, groceries, gasoline, sales tax, etc.

Suwannee Swifty maintained several levels of bank accounts through which Instant Ticket Proceeds were deposited and commingled. All cash receipts of Suwannee Swifty were ultimately commingled into a Concentration Account until further directed by Suwannee Swifty's Chief Financial Officer (hereinafter "CFO"). Upon receipt of a facsimile advise of a settlement amount due to the GLC, Suwannee Swifty's CFO would direct a deposit from the Concentration Account in an amount equal to the Settlement Sum into the Georgia Lottery Settlement Account. The original proceeds from the sale of Instant Tickets were *never* directly deposited into the Georgia Lottery Settlement Account.[2]

Suwannee Swifty, as the Debtor, failed to segregate cash proceeds from the sale of Instant Tickets in its accounts and

2. Suwannee Swifty used the same procedure to fund a similar "trust fund" account in favor of the Florida Lottery, as well as sales and other trust fund tax accounts and trust accounts for money order sales.

spent substantially all of its cash on hand, including cash lottery proceeds, prior to filing of its Bankruptcy case on December 12, 1996.

On or about January 30, 1997, shortly following the filing of the Bankruptcy Case, Thomas A. Schroeder, an in-house attorney with the GLC, transmitted by facsimile to Wayne Boone, Chief Operating Officer of Suwannee Swifty, an analysis of settlements which fell due during the week commencing December 8, 1996 and ending December 14, 1996 (hereinafter "Week I") (hereinafter "Schroeder Facsimile"). The Schroeder Facsimile shows that during Week I, a gross total of $201,600.00 in Instant Tickets became due to be settled. During Week I, against the aforesaid $201,600.00 of Settled Instant Tickets, Suwannee Swifty was allotted certain credits reducing the amount due to be swept by the GLC to $62,285.50. *This sweep failed because of a lack of funds in the Georgia Lottery Settlement Account.*

Relying upon the calculations contained in the Schroeder Facsimile, the GLC and Suwannee Swifty erroneously agreed that the amounts due during Week I to the GLC for *both* Instant Ticket and On-Line ticket sales were to be prorated as of the close of business on December 11, 1996. The result of the agreement was to be that proceeds only from On-Line and Instant Tickets sold after the filing of the Bankruptcy case were to be paid to the GLC. However, in effect, the agreement resulted in the erroneous payment for Instant Tickets sold within the 21-day period prior to bankruptcy. The error occurred because the Schroeder Facsimile ignored the 21-day settlement period for Instant Game Tickets and implied that both On-Line and Instant Game Tickets were due within seven (7) days of activation. Suwannee Swifty did not maintain 'in house' records of amounts due to the GLC, but relied upon GLC 'Advises.' Accordingly, on December 18, 1996, Suwannee Swifty wire transferred to the GLC out of the *Concentration Account* the sum of $86,677.50, leaving the balance due to the GLC of

$72,186.74 for both Instant Ticket and On-Line sales purportedly due Week I. Of the $86,850.00 payment, $32,573.00 was on account of Instant Tickets that the Schroeder Facsimile advised were due to be settled during Week I. Actually, this obligation arose not on account of Instant Ticket sales occurring after bankruptcy, as implied by the Schroeder Facsimile, but rather on account of Instant Tickets sold during the last three days of the week ending 21 days prior to the bankruptcy, the actual proceeds of which had been spent prior to the bankruptcy filing. The error was perpetuated by the GLC in the 3 weeks (21 days) which followed.

Between December 15, 1996 and December 21, 1996, (hereinafter "Week II"), the GLC advised that a gross total of $191,700.00 in Instant Tickets were due to be settled. After applicable credits, $61,902.48 was paid by a sweep of the Georgia Lottery Settlement Account by the GLC on December 24, 1996.

Between December 22, 1996 and December 28, 1996, (hereinafter "Week III") the GLC advised that a gross total of $193,800.00 in Instant Tickets were due to be settled. After applicable credits, $68,785.02 was paid by a sweep of the Georgia Lottery Settlement Account by the GLC on December 31, 1996.

Between December 29, 1996 and January 1, 1997 (hereinafter "Week IV"), the GLC advised that a gross total of $107,100.00 in Instant Tickets were due to be settled. After applicable credits, $43,904.22 was paid by a sweep of the Georgia Lottery Settlement Account by the GLC on January 7, 1997.

In addition to the funds paid to the GLC during Weeks I through IV, Suwannee Swifty also paid out additional funds for the benefit of the GLC in the form of validating (paying to consumers) winning Instant Tickets. These additional validation payments consisted of the following totals: Week I-$52,277.00;

Week II-$106,246.00; Week III-$109,049.00; and Week IV-$56,339.00. The GLC also applied these post-petition validation credits, together with the cash sweeps, to reduce Suwannee Swifty's pre-petition debt to the GLC by the total amount of $533,075.52 during Weeks I through IV.

To aid the Court, Petitioner sets forth the following time line:

a. November 21, 1996 through December 11, 1996: Instant Tickets Activated subject to the 21-day terms which are at issue;

b. December 12, 1996: Date of the filing of the Bankruptcy Petition;

c. December 8, 1996 through December 14, 1996: First settlement period (prorated as of the close of business December 11, 1996) which Instant Ticket Validations in the amount of $114,060.00 of which $52,277.00 were Validated on or after December 12, 1996 and contained a payment in the amount of $32,573.00 on account of prorated Instant Ticket Sales;

d. December 18, 1996: First post-petition transfer;

e. December 15, 1996 through December 21, 1996: Second settlement period which contained Instant Ticket Validations in the amount of $106,246.00 and a payment in the amount of $61,902.48;

f. December 24, 1996: Second post-petition transfer;

g. December 22, 1996 through December 28, 1996: Third settlement period which contained Instant Ticket Validations in the amount of $109,049.00 and a payment in the amount of $68,785.02;

h. December 31, 1996: Third post-petition transfer;

i. December 29, 1996 through January 1, 1997: Fourth settlement period (limited by the 21 day credit period) which contained Instant Ticket Validations in the amount of $56,339.00 and a payment in the amount of $43,904.22;

j. January 7, 1997: Fourth post-petition transfer;

k. February 13, 1997: Hearing to determine whether the Retailer Contract between Suwannee Swifty and the GLC would be assumed; and

l. March 3, 1997: Interim Order denying Suwannee Swifty's Motion to Assume Executory Contracts regarding lottery ticket sales for the states Georgia and Florida.

Actually, because of the filing of the Bankruptcy Petition, no monies should have been transferred or credited to the GLC on account of Instant Ticket sales until *after* the 21-day period commencing December 12, 1996, the date of the filing of the Bankruptcy Case. The validation credits generated during Weeks I through IV should have been applied to the amount due to the GLC for *post-bankruptcy* Instant Ticket sales. The proper allocation of the validation credits would have resulted in a substantial refund to Suwannee Swifty for amounts due for post-bankruptcy Instant Ticket sales.[3]

It is undisputed that no business record of either party reflects to what extent Instant Tickets from Packs Activated between November 21, 1996 and December 11, 1996 were sold

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3. Suwannee Swifty discovered the error in August 1997, following the closing of the sale of its Georgia stores in July 1997, at which time the GLC announced that it was owed an additional $110,343.30 for Instant Ticket sales during the 21-day period prior to the closing which amount was paid in accordance with a further order of the Bankruptcy Court.

to the public pre- or post-bankruptcy. The vast majority of Instant Tickets were sold almost immediately upon Activation. Because all sales of Instant Tickets were sold for *cash* and the party asserting the existence of a trust has the burden of proof to establish the existence of a trust *res*, the record evidences that no cash proceeds of Instant Tickets Activated during the 21-day period preceding the filing of the Bankruptcy Case can be shown to have still remained on the Petition Date because the record reflects that Suwannee Swifty's bank accounts were essentially zero.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted for several reasons. First, in affirming the order and judgment of the District Court, the Eleventh Circuit has entered a decision which sanctions a departure by the lower courts as to call for the exercise of this Court's supervisory power. In effect, the affirmance of the Bankruptcy Court's and the District Court's analysis, application, and conclusions based upon this Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990), the Eleventh Circuit has created post-petition debtor-in-possession obligations for pre-petition debtor liabilities, and further fails to address the intervention of bankruptcy trustee with federally-mandated fiduciary obligations between the receipt, commingling, and dissipation of trust funds, pre-petition, and the subsequent post-petition payments. Such a decision has nationwide bankruptcy ramifications to bankruptcy trustees which must be reviewed by this Court.

Moreover, the decisions of the lower courts have potentially far-reaching consequences of national importance. The lower courts improperly ruled that this Court's decision in *Begier*, *supra*, required a determination that an improper post-bankruptcy payment by a trustee or debtor-in-possession of an amount earmarked to cure a pre-bankruptcy shortage in a trust, conclusively identified the funds used to make the payment as

trust funds; thereby excluding the funds from property of the Bankruptcy Estate under 11 U.S.C. § 541, placing them outside the *in rem* bankruptcy jurisdiction of the federal courts under 28 U.S.C. § 1334(e), and rendering the transfer immune from recovery under 11 U.S.C. § 549. The Eleventh Circuit's decision eliminated the traditional requirement that the proponent of a trust fund identify the trust *res* through tracing. The decisions further overlook the distinction between pre-bankruptcy fiduciary obligations of a debtor, and the federal fiduciary obligations of a bankruptcy trustee or debtor-in-possession. If allowed to stand, the decisions of the Bankruptcy Court, the District Court, and the Eleventh Circuit could promote improper and inequitable distributions of bankruptcy estate, and improperly undermine federal *in rem* bankruptcy jurisdiction. Management of companies in Chapter 11 could insulate themselves from personal liability for the pre-petition debtor's failure to remit trust fund obligations, such as withholding or sales taxes, or lottery proceeds, by using the debtor's post-bankruptcy earnings to satisfy the debt while other debts remain unpaid. Under the lower courts' decisions, once the post-bankruptcy payment is made, it cannot be challenged. This is a gross distortion of *Begier* which cannot be allowed to stand.

Finally, the Eleventh Circuit's decision has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, specifically *Begier*, *supra,* and *Cunningham v. Brown*, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924). The Eleventh Circuit's affirming the validity of the determination that a post-petition payments made on account of a pre-petition liabilities fundamentally alters the distribution scheme of the United States Bankruptcy Code. As set forth below, *Begier* is plainly not applicable to the present case.

I. Summary of the Petition.

The Bankruptcy Court, District Court, and the Eleventh Circuit, each relying on *Begier*, erroneously held that the funds

paid and credited to the GLC were impressed with a state-statutory trust as a matter of conclusive presumption, and were, therefore, not part of the Bankruptcy Estate or subject to the jurisdiction of the federal courts under 28 U.S.C. § 1334(e). The fundamental error committed by lower courts is the fact that each ascribed no importance to the intervention of the filing of the Bankruptcy Case and the creation of a Bankruptcy Estate under 11 U.S.C. § 541. Moreover, the courts did not appear to consider the intervention of the statutory appointment of a debtor-in-possession to administer the estate under 11 U.S.C. §§ 1107 and 1108 as it pertains to the identification of the payments to the GLC as pre-bankruptcy statutory trust funds. Any 'nexus' between the creation of the state statutory trust and the 'voluntary' payment was broken where the uncontroverted evidence shows that the *pre-petition* trust *res* was dissipated and was no longer in existence on the date of the filing of the Bankruptcy Case. Upon the filing of the Bankruptcy Case, the Code preempts any state-law trust concept of 'replenishment' of dissipated trust property by the state law fiduciary. The cases relied upon by the lower courts, whose decisions and reasoning are essentially identical, deal exclusively with attempts to recover transfers and payments pursuant to 11 U.S.C. § 547, not post-bankruptcy transfers recoverable under 11 U.S.C. § 549. These cases do not stand for the proposition that a federal debtor-in-possession has an obligation to replace trust funds dissipated before bankruptcy with estate funds generated *after* the filing of the Bankruptcy Case; but, this is precisely the result required by the lower courts' holdings.

Petitioner requests that this Court grant this Petition where the decisions of the courts below cannot be allowed to stand because they: (a) erroneously restrict the jurisdiction of the federal courts by narrowing the definition of property of a bankruptcy estate under 11 U.S.C. § 541(a)(7) and 28 U.S.C. § 1334; (b) fundamentally fail to recognize that the preemptive, federal statutory fiduciary duties of a bankruptcy trustee or debtor-in-possession eclipse the pre-bankruptcy state fiduciary

functions of a pre-bankruptcy debtor, except with respect to property which actually comes into the physical possession of the federal trustee upon the filing of the bankruptcy petition; and (c) erroneously extend the decision of this Court in *Begier*, *supra*, to the post-bankruptcy conduct of a debtor-in-possession. As applied, the Eleventh Circuit's affirmation of the decisions of the lower courts *substantially* erodes the ability of bankruptcy trustees or debtors-in-possession to utilize 11 U.S.C. § 549 to recover monies which are erroneously, mistakenly, or improperly paid out of a bankruptcy estate in satisfaction of pre-bankruptcy breaches of trust to the detriment of the creditors who are entitled to receive the funds under the distribution scheme of the Code. These fundamental issues merit full consideration by this Court.

In each of the *tax* cases cited by the Bankruptcy Court, District Court, and the Eleventh Circuit, the trust-fund 'nexus', required by *Begier* (see discussion, *infra*), was provided either by a pre-bankruptcy payment out of the same account into which the trust funds had been commingled without the account balance falling below the amount necessary to satisfy the trust obligation, i.e. the lowest intermediate balance rule, or, in the instances in which the balance did fall below the balance due the trust, the payment was made by the pre-bankruptcy fiduciary charged by law with making the payment. Thus, the cases of *Begier v. Internal Revenue Service*, 496 U.S. 53, 11 S. Ct. 2258, 110 L. Ed. 2d 46 (1990), *Wasden v. Florida Department of Revenue (In re: Wellington Foods)*, 165 B.R. 719 (Bankr. S.D. Ga. 1994), and *Bethlehem Steel Corporation v. Tidwell*, 56 B.R. 932 (M.D. Ga. 1986), none of which involved post-bankruptcy payments, are not applicable to the facts in the present case.

II. In affirming the District Court, the Eleventh Circuit erred in finding that it did not have 28 U.S.C. § 1334(e) and 11 U.S.C. § 541(a)(7) jurisdiction over the payment of post-petition funds of the Bankruptcy Estate by Suwannee Swifty to satisfy pre-petition obligations owed to the GLC where such post-petition funds were, in fact, property of the estate and no trust 'nexus' existed between the post-petition funds actually paid and the pre-petition statutory trust in favor of the GLC.

The Bankruptcy Court, District Court, and the Eleventh Circuit ignored the single, critical distinction between the case at bar and every case cited in their respective opinions – the intervention of the filing of the Bankruptcy Case between the date of the creation of the statutory trust, and the date of the "voluntary" payment. The filing of the Bankruptcy Case destroyed any 'nexus' which the lower courts found essential to their conclusion that the funds transferred to the GLC were conclusively deemed to be subject to the state-law statutory trust in favor of the GLC.

The filing of the Bankruptcy Case injects two (2) fundamental concepts which completely destroy any notion of a presumption that funds paid to the GLC post-petition remained trust funds. First, the payment was not made by the fiduciary under the state statute charged with preserving the trust. In each case relied upon by the lower courts, the entity which owed the state statutory duty to account for the statutory trust voluntarily made a payment intended and designated to be applied to satisfy the statutory trust obligation. This is not true in this case. In this case, the payment was made by a bankruptcy debtor-in-possession, a new fiduciary created under an independent, superceding, and preemptive *federal* statute – the United States Bankruptcy Code. This federal fiduciary is in the nature of a third party, *except* to the extent the federal statute makes state law specifically applicable to the fiduciary. In this case, 28 U.S.C. § 959 does require that Suwannee Swifty comply with state

law, but only with respect to the management of property "in its possession". *Id.*

O.C.G.A. § 50-27-21(a) provides:

> All *proceeds* from the sale of lottery tickets or shares shall constitute a trust fund until paid to the corporation. . . . *Proceeds* shall include unsold instant tickets received by a lottery retailer and cash proceeds of the sale of any lottery products, net of allowable sales commissions and credit for lottery prizes. (emphasis supplied) O.C.G.A. § 50-27-21(a).

As mandated by 28 U.S.C. § 959, Suwannee Swifty complied with the state statutory trust requirements with respect to all Instant Tickets in its possession on the Petition Date or received thereafter. However, the undisputed evidence shows that there were no traceable 'proceeds' in its possession on the Petition Date. The error committed by the lower courts was their attempt to expand Suwannee Swifty's obligations to comply with the pre-bankruptcy, state-law statutory trust obligation beyond property 'in [its] possession' on the date of the filing of the Bankruptcy Case.

The lower courts also failed to acknowledge the preemptive federal duties of Suwannee Swifty as a debtor-in-possession under the Code and related statutes including, but not limited to, 11 U.S.C. §§ 1106, 1107, 1108, and 704, and specifically, 11 U.S.C. §§ 541(a)(7) and 544.

In pertinent part, 11 U.S.C. § 549(a) provides: "[t]he [debtor-in-possession] may avoid a transfer of property of the estate (1) that occurs after commencement of the case; and . . . (2)(B) that is not authorized under this title or by the court . . ."

In pertinent part, 11 U.S.C. § 550 provides " (a) . . . [t]o the extent that a transfer is avoided under section . . . 549 . . . of this title, the [debtor-in-possession] may recover, for the benefit

of the estate, the property transferred, or if the court so orders, the value of such property, from – (1) the initial transfer of such transferee or the entity for whose benefit such transfer was made; . . ."

Fed. R. Bankr. P. 6001 provides: "[a]ny entity asserting the validity of a transfer under section 549 of the Code shall have the burden of proof." Except as authorized by a specific court order, the Code prohibits payment of pre-bankruptcy, unsecured claims by a chapter 11 debtor-in-possession in advance of a plan approved by the creditors and confirmed by the court. *See* 11 U.S.C. §§ 507 and 1129.

In the present case, the uncontroverted evidence shows that the $533,075.72 which was erroneously, and without statutory or court authorization, paid to the GLC came from post-petition receipts from the sales of products other than the sale of Instant Tickets because all post-bankruptcy lottery ticket sales have been accounted for post-bankruptcy. These other receipts were clearly 'property of the estate' under 11 U.S.C. § 541(a)(7). Such property is subject to the exclusive jurisdiction of the federal courts in administering the bankruptcy estate. 28 U.S.C. § 1334(e).

Absent the showing of a 'nexus' between the state law statutory trust and the voluntary payment to the GLC, the finding that the funds paid to the GLC in this case were subject to the pre-bankruptcy state statutory trust and not included as property of the Bankruptcy Estate conclusively fails. No legally cognizable nexus exists in the case *sub judice*. Accordingly, the post-bankruptcy income of Suwannee Swifty which was mistakenly used to fund the payment of the pre-bankruptcy, unsecured claim of the GLC was property of the Bankruptcy Estate under 11 U.S.C. § 541(a)(7), and subject to the exclusive jurisdiction of the Bankruptcy Court. Therefore, the recovery of such funds is authorized under 11 U.S.C. §§ 549 and 550, and the decision of the courts below must be reversed.

III. The Eleventh Circuit erred in affirming that the issues presented in this case were governed by, or analogous to, the reasoning of this Court in *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990), and its progeny.

A. *Begier, supra*, and its progeny are not applicable.

The courts below rely heavily, if not solely, upon the case of *Begier*, *supra*, and its progeny, namely *Wasden v. Florida Department of Revenue (In re: Wellington Foods, Inc.)*, 165 B.R. 719 (Bankr. S.D. Ga. 1994). In *Begier*, the central question involved whether *tax* payments made to the IRS prior to the filing of the bankruptcy case were property of the bankruptcy estate, and whether the trustee could avoid these payments to the IRS as preferences under 11 U.S.C. § 547. In order to be recoverable as preferences, the funds must not have been subject to a trust in favor of the recipient of the transfer, because, as such, the beneficial ownership of the trust *res* is not in the debtor, and, therefore, not subject to claims of the debtor's creditors. *Id.* In discussing 26 U.S.C. § 7501, the federal tax trust fund statute, the court identified an alleged 'presumption' or 'reasonable assumption' as to what constituted trust proceeds. *Id.* The Court stated that voluntary *pre-petition* payments of federal trust fund taxes out of the debtor's assets is sufficient to satisfy a 'reasonable nexus'. *Id.* at 67.

Begier is clearly distinguishable on its facts and is wholly inapplicable to the present case. Initially, *Begier* concerns *pre-petition payments* by the entity which collected the trust funds and also owed the obligation to pay. It clearly does not apply to the *post-petition transfers* by the debtor-in-possession for *pre-petition obligations* of a debtor. Secondly, *Begier* is distinguishable because it concerned a specific federal tax statute, 26 U.S.C. § 7501, containing specific trust language applicable only to withholdings for federal trust-fund taxes. Finally, *Begier* is factually distinguishable because the taxes held in trust for the IRS were in an account containing sufficient

funds to cover the amount claimed to be trust fund tax proceeds. In the present case, the Suwannee Swifty's accounts dropped to essentially zero between the time of deposit of the trust receipts and the dates of payment.

Several cases have distinguished, explained, and criticized *Begier*. *See, e.g.*, *Wendy's Food Systems, Inc. v. State of Ohio c/ o Department of Taxation*, 133 B.R. 917 (S.D. Ohio 1991); *In re Sunrise Paving, Inc.*, 204 B.R. 691 (D. Md. 1996) (holding that at 26 U.S.C. § 7501 federal tax trust is radically different from common-law trusts); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92 (3rd Cir. 1994) (recognizing that *Begier* may be applicable to the IRS and other taxing authorities, but not necessarily to other trust beneficiaries).

The District Court's opinion also heavily relies upon *Wasden v. Florida Department of Revenue (In re: Wellington Foods, Inc.)*, 165 B.R. 719 (Bankr. S.D. Ga. 1994). *Wasden*, another attempt to recover pre-bankruptcy payments to the IRS as preferences, noted that the debtor collected and specifically held funds as 'trust fund taxes' under 26 U.S.C. § 7501, and voluntarily made the tax payments to the IRS from its pre-bankruptcy accounts which intermittently showed negative balances between the date of the collection of the taxes and the date of payments. *Id.* The court held that the voluntary payments of tax funds to the IRS by the pre-bankruptcy debtor were nevertheless presumed to be trust monies because the debtor which owed the statutory duty to collect the tax, identified the funds as trust funds by making the voluntary payment. *Id.* The funds were therefore not 'property of the debtor' as required for a preference recovery under 11 U.S.C. § 547.

In *Wasden*, the funds 'identified' by the debtor as constituting trust proceeds were pre-bankruptcy deposits, not subject to a competing federal trust as property of a bankruptcy estate. In the present case, the trust funds were not 'identified' by the pre-bankruptcy debtor having the statutory duty to so 'identify' the funds (i.e. replenish, *see Bethlehem Steel*, *infra*),

but rather by the post-bankruptcy debtor-in-possession with statutory trust obligations under the Code which prohibited using unencumbered estate funds to replenish a depleted pre-bankruptcy trust fund.

The courts below also cited the case of *Bethlehem Steel Corporation v. Tidwell*, 56 B.R. 932 (M.D. Ga. 1986), another preference case under 11 U.S.C. § 547. The inapplicability of this case is apparent in that court's discussion of the replenishment of trust funds deposited into a commingled account. The court in *Bethlehem Steel* found that where a *pre-bankruptcy* trust fund is depleted below the amount to be held in trust for a beneficiary, the pre-bankruptcy trustee is presumed to replenish the trust with the first available funds. Thus, the court found that the payments made were on account of the *pre-petition* replenishment of the trust which satisfied any trust tracing theory, including the 'lowest intermediate balance rule'. *Id.*

Here, the *pre-bankruptcy* trust was never replenished with *pre-bankruptcy* funds, and the trust was not replenished by the pre-bankruptcy fiduciary having the common-law (or statutory) trust obligation to replenish, as required under *Bethlehem Steel*. These conspicuous factual distinctions render *Bethlehem Steel* inapplicable.

In essence, what the Bankruptcy Court, the District Court, the Eleventh Circuit fail to discern is that in *Begier*, *Wasden*, and *Bethlehem Steel*, there was a *continuity* of the same entity making the payments, but, in the instant matter, there exists an *intervening* and *new* entity, the statutory debtor-in-possession. The fact that there is a new entity with federal statutory fiduciary duties involved in the present case clearly distinguishes it from the cases relied upon and cited by the courts below. The Bankruptcy Court and the District Court, which were affirmed by the Eleventh Circuit, committed clear error in determining that unidentified funds received by a federal debtor-in-possession after the filing of the Bankruptcy Case may be

impressed with a statutory trust for a pre-petition, unsecured obligation. Because the 'same entity' nexus of *Begier* is terminated upon the filing of the bankruptcy, the party contending that it was paid with its own trust funds must identify the funds paid to it through common law tracing principles. The GLC did not and could not carry that burden here.

This Court should grant this Petition in order to clarify and differentiate the duties of a bankruptcy trustee or debtor-in-possession with respect to the beneficiaries of a pre-petition trust from those of the pre-bankruptcy debtor that breached the trust obligations. By failing to recognize these fundamental differences, the lower courts erroneously applied the reasoning of *Begier* to this case. If the decisions are allowed to stand, they will constitute a substantial misstatement of the powers and duties of a bankruptcy trustee or debtor-in-possession and impose an unwarranted limitation on bankruptcy *in rem* jurisdiction under 28 U.S.C. § 1334(e). If the 'duty to replenish' a dissipated pre-petition trust carries over into bankruptcy, is a trustee or debtor-in-possession who fails to replenish the dissipated trust personally liable to the beneficiaries for the shortfall?

Moreover, the Eleventh Circuit's reliance upon the decisions of the Bankruptcy and District Courts does not set forth any explanation of the obvious differences between *Begier* and the present case, and is ultimately unconvincing. The lower courts simply failed to recognize the statutory difference between 11 U.S.C. § 547 and 11 U.S.C. § 549 in regard to the different identities and the attendant obligations of the entity making the post-petition transfers on account of a pre-petition debt and the source of the funds used to make the payments. In the present case, the funds used for the payments made to the GLC were 'property of the estate', a distinction which *none* of the cases cited by any of the courts below addressed.

Accordingly, the Petitioner urges this Court to grant this Petition in order to reverse the lower courts' erroneous

application of *Begier* to the facts of the instant case, and to clarify the post-bankruptcy obligations of a debtor-in-possession under the Code from the pre-bankruptcy obligations of a debtor with respect to underfunded trusts.

B. The Eleventh Circuit erred in affirming the District Court's finding that there was a 'reasonable nexus' between the pre-petition trust and the funds transferred post-petition.

The 'reasonable assumption' enunciated by *Begier* may be rebutted with specific facts. *Wendy's Food Systems, Inc. v. State of Ohio c/o Department of Taxation*, 133 B.R. 917 (S.D. Ohio 1991). In examining *Begier*'s reasoning that 'voluntary payments' satisfy and supercede any further requirements of tracing tax trust proceeds in a commingled bank account, *Wendy's* held that *Begier* established only a presumption or 'reasonable assumption', and not a conclusion, and that such presumption may be rebutted by evidence which shows that a 'nexus' does not exist. *Id.* at 921.

Wendy's articulated three (3) factors which a [federal tax] beneficiary must show to evidence a [federal tax] trust: (1) that the debtor collected or withheld the taxes, *pre-petition*, thus creating a trust in the amount of those taxes collected or withheld; (2) that the debtor made a *pre-petition* voluntary payment to the taxing authority from its *unencumbered* assets; and (3) that a 'reasonable nexus' exists between the first and second steps. *Id.*; *Begier*, *supra*.

Wendy's found that no 'reasonable nexus' existed or could exist where a pre-petition bank account which held pre-petition trust proceeds fell below the amount claimed as trust fund taxes, and, therefore, no trust fund attached to those monies. *Id.* at 922. *Wendy's* further found that this crucial factual distinction regarding the balance in a commingled account removed the reasonableness from the assumption created

in *Begier*, and thus required the trust beneficiary to trace the pre-petition trust fund proceeds through a commingled bank account. *Id.* at 921.

Accordingly, while *Wasden, supra,* was willing to find the *Begier* 'nexus' where the party directing the remittance owed a common-law fiduciary duty to replenish a depleted tax trust fund, *Wendy's* required that the tax trust beneficiary must satisfy common-law tracing rules in order to establish a 'reasonable nexus' in identifying the funds as trust proceeds. *Neither* element is present here because the party making the payment was not the state-law fiduciary, and the funds paid over could not be traced to pre-bankruptcy trust fund collections.

C. The post-petition payments were not made with Instant Ticket proceeds.

A taxpayer may designate the application of a voluntary payment to either trust or non-trust tax liabilities, but in the absence of such a designation, the IRS treats the payment as one representing payment of a non-trust tax liability. *See Hoffman v. United States*, 208 B.R. 788 (D. Conn, 1997) (*citing Sotir v. United States*, 978 F.2d 29, 30 (1st Cir. 1992), *cert denied*, 507 U.S. 961, 113 S. Ct. 1388, 122 L. Ed. 2d 762 (1993)). It has been further held that absent an indication that the debtor paid funds from a pre-petition trust account, and the payments occurred post-petition, the voluntary payments are presumed to be from general assets not subject to any trust characterization. *See Bison Heating & Equipment, Inc. v. New York State Department of Taxation and Finance*, 177 B.R. 785, n.3 (W.D.N.Y. 1995) (distinguishing the *pre-petition* payments in *Begier, supra*, from the *post-petition* payments in its case).

D. There is no trust *res*.

A party claiming a benefit from the *res* of a trust has the burden of tracing any commingled funds. *Schuyler v. Littlefield*, 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 (1914); *Cunningham v. Brown*, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924);

see e.g. Connecticut General Life Insurance Co. v. Universal Ins. Co., 838 F.2d 612 (1st Cir. 1988).

In the present case, the GLC, as the beneficiary of the trust, was required to prove the existence of a trust, and identify the trust *res* in the commingled funds of Suwannee Swifty. This the GLC did not, and has stipulated that it cannot do.

In re: Sunrise Paving, Inc., 204 B.R. 691 (D. M.D. 1996), held that there was inadequate evidence that a trust *res* was identified by the debtor's mere issuing of a check to the IRS for federal taxes. *Id.* at 697. In discussing voluntary payments, the court found the debtor's attempt to identify the *res* of the 26 U.S.C. § 7501 tax trust by merely writing a check to the IRS was inadequate where the debtor, which was asserting the validity of the transfer, failed to introduce evidence as to what monies were in the account. The court further held that even if mailing the check might constitute an act of voluntary payment by the debtor to create a 26 U.S.C. § 7501 federal tax trust, *it was done post-petition when the debtor no longer had rights in the account. Id.* at 696.

Sunrise Paving reaffirms a fundamental tenant of bankruptcy law: that the debtor and trustee/debtor-in-possession are treated as separate and distinct entities. There can be no presumption of the continuity of an identifiable trust *res* evidenced merely by *post-petition payments* for a *pre-petition liability* where the post-petition payments are made, not by the entity which collected the funds alleged to have been impressed with the trust and which had already been disbursed pre-bankruptcy, but by another entity out of its separate receipts which were received post-bankruptcy.

E. The GLC has not established the required 'nexus' through tracing any alleged trust monies through any pre- or post-bankruptcy account.

The traditional rule for tracing trust proceeds commingled with other monies in a bank account is generally known as the 'lowest intermediate balance' rule. *Connecticut General Life Insurance Co. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988); *Schuyler v. Littlefield*, 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 (1914); *See generally Ragsdale v. South Fulton Machine Works, Inc.*, 211 B.R. 411 (N.D. Ga. 1997) (*citing Bethlehem Steel Corp. v. Tidwell*, 66 B.R. 932, 942 (M.D. Ga. 1986)). Under the application of this rule, when trust funds are commingled with other funds of the debtor, the beneficiary of the trust may recover only to the extent of the lowest balance that the account reached after the commingling. *Id.* at 418. *The trust beneficiary' ability to trace the commingled funds under the 'lowest intermediate balance rule' has been limited to the bank account where the trust funds are actually deposited. See generally Connecticut General Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612 (1st Cir. 1988); *In re: United Cigar Stores Co.*, 70 F.2d 313 (2nd Cir. 1934).

Correspondingly, in establishing the 'reasonable nexus' requirement, if the debtor has commingled trust funds in a general bank account which falls below the amount claimed to be trust proceeds, the beneficiary may use the lowest intermediate balance rule to establish its tracing burden. *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92 (3rd Cir. 1994) (*citing Begier, supra*). *Sharon Steel* noted that even though the account out of which the funds may have been transferred may have contained funds exceeding the amount claimed as federal tax trust funds, the court did not have sufficient facts from the beneficiary to determine what amounts were in those accounts were subject to the trust, as required under the lowest intermediate balance rule. *Id.* In other words, the beneficiary did not meet its burden of proof for tracing the funds.

In the present case, the GLC can neither meet its burden of proof nor produce any evidence as to the lowest intermediate balance in any of the Debtor's bank accounts between the beginning of the 21-day period and the filing of the Bankruptcy Case.

IV. The decisions of the lower courts clearly undermine federal bankruptcy court jurisdiction under 28 U.S.C. § 1334.

This Court should grant this Petition to consider how the decision of the Eleventh Circuit in affirming the decisions of the courts below undermine the jurisdiction of the federal courts under 28 U.S.C. § 1334(e). 28 U.S.C. § 1334(e) provides:

> The district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, *of the debtor as of the commencement of the case, and of the property of the estate*. (emphasis supplied). 11 U.S.C. § 1334(e).

Because proper 'trust' properties are outside of 28 U.S.C. § 1334(e) jurisdiction, the rulings below effectively hold that the monies improperly paid to the GLC are beyond the court's jurisdiction. If these decisions are allowed to stand, any trustee or debtor-in-possession could place properties which would otherwise be property of the bankruptcy estate under 11 U.S.C. § 541(a)(7) beyond the jurisdictional reach of the federal court by merely transferring those funds to the holder of a claim arising out of a debtor's pre-petition breach of trust conduct. Debtors-in-possession could pay past-due federal and state trust fund taxes out of monies earned by a bankruptcy estate, post-petition, and, thereby, relieve themselves of liability, even if the funds were otherwise (as in the case *sub judice*), subject to a blanket lien of a secured lender. Debtors-in-possession, by merely paying over estate funds, could attempt to avoid personal criminal sanctions arising out of violation of 'constructive trust'

obligations such as those discussed in *Bethlehem Steel*, *supra*, simply by paying the debt out of the bankruptcy estate funds. Under the rulings below, debtors-in-possession could make these payments, notwithstanding the fact that insufficient funds were on hand on the date of the filing of the bankruptcy petition to cover the obligations without the fear that the funds would have to be repaid under 11 U.S.C. §§ 549 and 550.

It is without question that once a bankruptcy petition is filed, any party contending that commingled estate funds include monies subject to a trust has the burden of identifying the funds by tracing. There is simply no exception to this rule. To permit any exception undermines the Congressional intent of the Code. As the *Begier* court stated, "equality of distribution among creditors is essential policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro-rata shares of the debtor's property." *Id.* at 58.

Simply stated:

(1) Debtors who are fiduciaries under contractual and statutory trusts who have dissipated or encroached assets do file bankruptcy.

(2) When such a bankruptcy is filed, the rights of creditors of the debtor and the rights of beneficiaries of the trust are frozen.

(3) If the trust *res* can be identified, the *res* is excluded from the bankruptcy estate under 11 U.S.C. § 541(d), and the beneficiaries of the trust are entitled to the property.

(4) If the trust *res* consists of funds which are commingled with other funds of the debtor, the beneficiaries of the trust have the burden of proof of identifying the trust funds among the commingled funds, utilizing tracing.

(5) If the funds in the debtor's commingled accounts constituting the trust *res* cannot be identified, the beneficiaries of the trust have no claim against estate assets and hold only general, unsecured claims for the debtor's breach of trust.

Because the GLC stipulated that it was unable to identify proceeds of the sale of lottery tickets remaining in the debtor's accounts as of the date of the filing of the Bankruptcy Case, the GLC cannot, as a matter of law, prevail. Therefore, the Eleventh Circuit's affirmation of the judgments of the District Court and the Bankruptcy Court must be reversed with instructions to grant the motion for summary judgment of Suwannee Swifty. Therefore, the judgment of the Eleventh Circuit should be considered by this Court.

V. The GLC Is Simply An Unsecured Creditor Of The Bankruptcy Estate.

Where it is impossible for a trust beneficiary to trace trust proceeds following their deposit into a commingled account, the trust beneficiary becomes merely an unsecured creditor to the extent of its loss. *Cunningham v. Brown*, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924).

It is clear that the GLC cannot trace any alleged pre-petition trust proceeds, and the GLC is simply an unsecured creditor of the Bankruptcy Estate. To this extent, the Suwannee Swifty does not dispute that it owes money to the GLC and that it is a creditor, but such funds were not held in trust. Thus, the payments to the GLC unfairly benefited the GLC to the detriment of the remaining unsecured creditors. The Eleventh Circuit's per curium opinion affirming the lower courts' granting the GLC's motion for summary judgment and denying Suwannee Swifty's motion must be reversed.

CONCLUSION

The facts stipulated in lower courts conclusively establish that the payments made to the GLC were funded by non-trust, post-bankruptcy receipts which were property of the bankruptcy estate under 11 U.S.C. § 541(a)(7). Furthermore, the transfer was not unauthorized under Title 11, but was, in fact, expressly prohibited. The GLC failed to carry its burden under Fed. R. Bankr. P. 6001 that it was paid with 'proceeds' of the pre-bankruptcy sale of Instant Tickets by the Debtor.

The tax case authorities relied upon by the courts below, *Begier*, *Wasden*, and *Bethlehem Steel*, are clearly applicable only to federal trust fund taxes collected and paid prior to the filing of a bankruptcy petition during the preference period. These decisions simply have no applicability here and the judgment of the Eleventh Circuit must be reversed.

Therefore, Petitioner Suwannee Swifty Stores, Inc. requests this Court to GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 28, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13732

D. C. Docket No. 01-00053-CV-CDL-6

In Re: SUWANNEE SWIFTY STORES, INC.,

Debtor.

SUWANNEE SWIFTY STORES, INC.,

Plaintiff-Appellant,

versus

GEORGIA LOTTERY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(April 28, 2003)

Appendix A

Before BIRCH, HULL, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM: AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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* Honorable B. Avant Edenfield, United States District Judge for Southern District of Georgia, sitting by designation.

1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR FOR THE MIDDLE DISTRICT OF GEORGIA, THOMASVILLE DIVISION DATED AND FILED MAY 24, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CASE NO. 6:01-CV-53 (CDL)

SUWANNEE SWIFTY STORES, INC.

Appellant/Debtor

vs.

GEORGIA LOTTERY CORPORATION,

Appellee

ORDER

The Court presently has pending before it Suwannee Swifty, Inc.'s ("Debtor" or "Suwannee Swifty") appeal from the Bankruptcy Court's May 17, 2001, order granting the Georgia Lottery Corporation's (the "Lottery" or "GLC") motion for summary judgment and denying Suwannee Swifty's motion for summary judgment. The Bankruptcy Court found as a matter of law that the Debtor was not entitled pursuant to Sections 549 and 550 of the Bankruptcy Code to recover post-petition transfers made to the GLC. Having considered the briefs and oral argument of the parties, this Court hereby affirms the decision of the Bankruptcy Court.

Appendix B

STANDARD OF REVIEW

In reviewing bankruptcy court judgments, a district court functions as an appellate court. It reviews the Bankruptcy Court's legal conclusions *de novo,* but must accept the Bankruptcy Court's factual findings unless they are clearly erroneous. *In re JLJ, Inc.,* 988 F.2d 1112,1116 (11th Cir. 1993). The parties in this case do not dispute the Bankruptcy Court's factual findings. The Debtor's appeal is based solely upon the Bankruptcy Court's legal conclusions. Consequently, this Court need not evaluate the Bankruptcy Court's factual findings but will analyze the Bankruptcy Court's legal conclusions *de novo.*

FACTUAL BACKGROUND

As stated hereinabove, the facts giving rise to this appeal are essentially undisputed. Debtor operated approximately 109 retail convenience stores in South Georgia and North Florida. Seventy of these stores were located in Georgia. On or about October 19, 1994, Suwannee Swifty entered into a Retailer Contract with the Georgia Lottery for the sale of lottery tickets for Instant and other non-On-Line games in connection with the State of Georgia's Lottery (the "Contract"). In addition to the terms of the Contract, the parties' relationship was governed by the Georgia Lottery for Education Act (O.C.G.A. § 50-27-1 et seq.) (the "Lottery Act").

Pursuant to the Lottery Act, the GLC may adopt regulations, policies, and procedures regulating the conduct of lottery games in general. These policies and procedures include GLC's regulations (the "Regulations"). The Regulations

provide that in the event of any inconsistencies between the Lottery Act, Regulations, and Contract, the Lottery Act governs the Regulations, and the Regulations govern the Contract.

During the relevant time period, "Instant Tickets"[1] were delivered to each retail store in packs having a nominal face value of $300.00 per pack (hereinafter "Pack" or "Packs"). Upon receipt of a Pack of Instant Tickets at a specific retail store, the retail store is required to change the status of the Pack to "Confirmed" using a bar code reader at the retail store terminal which is connected on-line to the GLC (hereinafter "Confirmed Pack").

Prior to the sale of individual Instant Tickets from a Confirmed Pack of Instant Tickets, the retail store will again change the status of the pack to "Activated" by scanning the Pack a second time, meaning that Instant Tickets from such Pack may be sold to the public (hereinafter "Activated Pack").

The Activated Pack's status changes to "Settled" on the earlier of 21 days after Activation or the date the retailer consciously makes a choice to settle a Pack (hereinafter

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1. Tickets evidencing Instant Games are hereinafter collectively referred to as "Instant Tickets." In the present case, only Instant Tickets are at issue. On-Line tickets are not at issue. The Retailer Rules and Regulations of the GLC's Policies and Procedures Manual define an "On-Line Game" as "[a] lottery game developed and offered for sale to the public where Tickets are produced by on-line Lottery Terminals and players match their numbers to those produced during regularly scheduled random drawings." Tickets evidencing On-Line Games are hereinafter referred to as "On-Line Tickets".

"Settlement Date"), whether the Instant Tickets in the Pack have all been sold or not. The Retailer Rules and Regulations of the GLC's Policies and Procedures Manual define "Settled Pack" as "[t]he status of the Pack of Tickets which enables the GLC to bill (or settle) the Retailer's account based upon a pre-determined formula or schedule."

Pursuant to the Lottery Act, Regulations, and Retailer Contract, Suwannee Swifty maintained a separate trust account for the benefit of the Georgia Lottery (the "Georgia Lottery EFT Trust Account" or the "Trust Account") at NationsBank n/k/a Bank of America (the "Bank"). Suwannee Swifty deposited proceeds from the sale of Lottery Tickets in this account which allowed the GLC to perform electronic fund sweeps from it. The sweeps occurred on the Tuesday following the preceding fiscal week (Sunday 12:00 a.m. through Saturday 11:59 p.m.) (the "Sweep Date") for the amount of "the Tickets that settled during that fiscal week, less returned Tickets, Commissions, Validations, and other adjustments or payments. The Lottery Act, Regulations and Retailer Contract required Suwannee Swifty to deposit proceeds daily from the sale of Instant Tickets into the Georgia Lottery EFT Trust Account no later than the next business day after the sale to the public of the Instant Ticket The Debtor, however, did not deposit the proceeds from the sale of Instant Tickets into the Trust Account on a daily basis. Although Debtor maintained a separate Trust Account at the Bank located in Albany, Georgia, each of Debtor's retail stores maintained a separate "store account" in the community where the store was located. Each store deposited all of its general receipts as well as proceeds from lottery ticket sales into its store account. These funds were then

swept into a central account at the Bank from which Debtor paid its operating expenses.

On the day before the weekly Sweep Date, the GLC would, by facsimile, issue an advisement informing Suwannee Swifty of the amount to be swept by the GLC for Instant and On-Line Lottery Ticket Sales. On the next banking day, the amount on the advisement would be electronically swept from the Georgia Lottery EFT Trust Account. Debtor would deposit funds from its other accounts into the Georgia Lottery EFT Trust Account to cover the amount to be swept.

On December 12,1996, Suwannee Swifty fled its Voluntary Petition for relief under Chapter 11 of the United States Bankruptcy Code. During the week of December 8 – 14, 1996 (Week I), the week the petition was filed, a gross total of $201,600.00 in Instant Tickets was settled. After Applicable Credits[2], the amount to be swept by the GLC for

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2. "Applicable Credits" means Instant Returns, Instant Tickets Validated, Instant Sales Commissions, Instant Cashing Commissions. The amount swept by the GLC on each Sweep Date was calculated taking the total Instant Tickets Settled for the week minus the Applicable Credits. These terms have the following meanings:

(i) *Instant Tickets Settled* means the amount of Instant Tickets settled by Suwannee Swifty on that date.

(ii) *Instant Returns* means those Instant Tickets that were returned to the GLC by Suwannee Swifty.

(iii) *Instant Tickets Validated* means those Instant Tickets which Suwannee Swifty validated by paying cash to the winner.

(Cont'd)

Appendix B

Instant Ticket Sales was $62,285.50. Additionally, $96,578.74 was to be swept for On-Line Ticket sales during Week I, resulting in a total balance to be swept of $158,864.24. This sweep failed because of a lack of funds in the Georgia Lottery EFT Trust Account.

Due to the filing of the Suwannee Swifty Bankruptcy Petition on December 12, 1996, the GLC and Debtor agreed that the amounts to be swept on account of the tickets settled during Week I by the GLC for both Instant Ticket and On-Line Ticket Sales would be prorated as of the close of business on December 11, 1996. On December 18, 1996, Debtor wire transferred to the GLC out of its general operating account at the Bank (the "Georgia Concentration Account"), as opposed to the Georgia Lottery EFT Trust Account, the sum of $86,677.50, leaving a balance due to the GLC of $72,186.74 for both Instant Ticket and On-Line sales for Week I. Of the $86,677.50 payment, $32,573.00 was on account of Instant Tickets that settled during Week I. Suwannee Swifty did not allege in its complaint that this transfer on December 18, 1996, should be avoided,

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(iv) *Instant Sales Commission* means those amounts paid to Suwannee Swifty as commissions for the sale of Instant Tickets. The amount of the Sales Commission varied between 5% to 10% depending on the Instant Game.

(v) *Instant Cashing Commission* means those amounts paid to Suwannee Swifty as commissions for cashing winning Instant Tickets. The amount of the Cashing Commission was 2% for every prize paid (Stip. 26).

but in subsequent pleadings has asserted that it is entitled to recover it.

Between December 15, 1996, and December 21, 1996 (hereinafter "Week II"), a gross total of $191,700.00 in Instant Tickets settled. After Applicable Credits, the balance due of $61,902.48 on account of Instant Tickets was swept from the Georgia Lottery EFT Trust Account by the GLC on December 24, 1996.

Between December 22, 1996, and December 28, 1996 (hereinafter "Week III"), a gross total of $193,800.00 in Instant Tickets was settled. After Applicable Credits, the balance of $68,785.02 on account of Instant Tickets was swept from the Georgia Lottery EFT Trust Account by the GLC on December 31, 1996.

Between December 29, 1996, and January 1, 1997[3] (hereinafter "Week IV), a total gross of $107,100.00 in Instant Tickets settled. After Applicable Credits, the balance of $43,904.22 on account of Instant Tickets was swept out of the Georgia Lottery EFT Trust Account by the GLC on January 7, 1997.

No business record of either party reflects to what extent the Instant Tickets from Packs Activated between November 21, 1996, and December 11, 1996, were sold to the public pre or post-petition. The mere fact that a pack of tickets was Activated pre-petition does not mean the tickets therein were sold to the public pre-petition.

3. January 1 concluded the 21 day period for which packs activated pre-petition were settled.

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On December 12, 1996, in conjunction with its Chapter 11 filing, Suwannee Swifty filed an Emergency Application for Authority to Use Cash Collateral and Grant Replacement Lien wherein it requested that the Bankruptcy Court allow it to use cash to pay critical operating expenses, including disbursements to the Georgia Lottery. Following a hearing on Suwannee Swifty's application, the Bankruptcy Court entered an order on December 17,1996 authorizing estimated weekly disbursements for the first four weeks of the case to, *inter alia,* the Lotteries for the States of Georgia and Florida, in the aggregate amount not to exceed $859,000 or $215,000 per week.[4]

On December 19, 1996, Suwannee Swifty filed its Emergency Motion to Assume Executory Agreements with the Georgia Lottery wherein it asserted that "[a] major source of revenue for [Suwannee Swifty] is the sale of lottery tickets under the lottery systems of the State of Georgia. . . ." After a preliminary telephonic hearing on the matter, the Bankruptcy Court found that the amount owed to the GLC on the Petition Date was "approximately $73,000 for pre-petition lottery sales" and the Bankruptcy Court ordered that Suwannee Swifty was authorized to continue selling lottery tickets under its agreement with the Georgia Lottery.

On February 13, 1997, a formal hearing was held to determine whether the Contract between Suwannee Swifty and the Georgia Lottery would be assumed. Suwannee Swifty, through its counsel and the testimony of two officers of the

4. On January 6, 1997, the Bankruptcy Court entered a consent order authorizing the disbursement of funds to the Georgia and Florida Lotteries for the four week period ending January 23, 1997, in amounts averaging $212,000 per week.

company, told the Bankruptcy Court that "[t]he amount of pre-petition arrearage to [the] Georgia [Lottery] is $72,187." Suwannee Swifty's counsel further asserted that the Georgia Lottery Contract should be assumed because other than the amounts proposed to be paid on account of the pre-petition arrearage claim, "[t]he money that will be paid to the state will be the state's trust funds, to which NationsBank will have no claim."

Both the Bank and the Creditors Committee appeared at the hearing and objected to the assumption of the Retailer Contract because it would involve payment of the pre-petition arrearage claim of $72,187.00, but did not object to any other payments. The Bankruptcy Court, reserving judgment on Suwannee Swifty's assumption of the Georgia Lottery Contract, entered its March 3, 1997, Interim Order on Debtor's Motion to Assume Executory Contracts Regarding Lottery Ticket Sales for the States of Georgia and Florida, with the written consent of the Debtor and the GLC, and specifically ruled, *inter alia*, as follows:

> 2. The Court finds that the total arrearage of the Debtor to the Georgia Lottery Corporation, as of December 12, 1996, the date of the filing of the Voluntary Petition herein, was $72,187.00, and the entry of the Order shall be deemed a Proof of Claim for such amount by the Georgia Lottery Commission [sic] . . . and the Debtor shall make no payments on such claims until further Order of the Courts.[5]

5. This paragraph further provided that it was not making a finding of the statutory priority of the claim, only a finding as to the amount.

3. The Debtor-in-Possession shall continue to operate as a Georgia Lottery Retailer in compliance with the terms of the aforesaid Retailer Contract [which was attached to the Order] and the Georgia Code and the rules and regulations of the Georgia Lottery Corporation; . . . .

5. The Debtor-in-Possession acknowledges and this Court hereby finds that upon deposit into the Georgia Lottery Concentration Account, establishing a trust for the Georgia Lottery Corporation, all monies received by the Debtor from the sale of Georgia Lottery tickets become the property of the Georgia Lottery Corporation and the Debtor-in-Possession shall not make any withdrawals from such account except as is expressly authorized by the Retailer Contract; . . . .

The GLC has never received payment on its pre-petition arrearage claim of $72,187.

Suwannee Swifty now contends that in July of 1997, it discovered that it had made a "fundamental error" that led to "a substantial overpayment to the GLC," yet it did not file its complaint until 17 months later.

On December 11, 1998, Suwannee Swifty filed its Complaint to Recover Unauthorized Post-Petition Transfers Under 11 U.S.C. § 549 in the United States Bankruptcy Court, Middle District of Georgia, Thomasville Division, against the GLC. Although its original complaint sought to recover $634,584, Debtor amended its complaint to reduce the claim

to $533,075.32. In its amended complaint, Suwannee Swifty includes in its damages the "Validation Amount"–the amount of money paid by Suwannee Swifty on the GLC's behalf for winning Instant Tickets (the "Validations"). The total amount of Validations from December 12, 1996, the date of bankruptcy filing, until January 1, 1997, was $325,911.00. Suwannee Swifty then adds to that figure those amounts actually swept by or paid to the GLC (the "Sweep Amount") on account of Instant Tickets for the following dates: December 18,1996, December 24,1996, December 31,1996, and January 7,1997, which totals $207,164.72. However, the amount actually transferred to the GLC on those dates was adjusted downward on account of the credit given to Suwannee Swifty for the Validations. Therefore, Suwannee Swifty is seeking to recover not only those amounts transferred to the GLC post-petition, but it also seeks to recover Validations for which it received credit post petition. In addition, some of the amounts transferred during the period in question by Debtor were on account of Packs that were Activated post petition and manually settled prior to the 21 day Settlement Date.

DISCUSSION

It is an elementary principle of bankruptcy law that upon the filing of a petition for bankruptcy protection a debtor's right to transfer property is significantly limited in order to preserve the bankruptcy estate for claims by legitimate creditors. Sections 549 and 550 of the Bankruptcy Code specifically restrict certain transfers of property from the bankruptcy estate. It is undisputed in the case *sub judice* that the Debtor transferred assets to the GLC after it filed its bankruptcy petition. The Debtor now contends those transfers

were mistakenly made and are recoverable from GLC as improper post-petition transfers. The Bankruptcy Court found these post-petition transfers to the GLC were subject to a trust and thus excluded from the bankruptcy estate. Accordingly, the Bankruptcy Court found the transfers were not recoverable. The issue before this Court on appeal is whether these post-petition transfers to the GLC were subject to a trust and, therefore, properly excluded from the property of the estate, as determined by the Bankruptcy Court.

The trust in this case arises from the statutory provisions of the Georgia Lottery Act. That Act provides in part:

> All proceeds from the sale of lottery tickets or shares shall constitute a *trust fund* until paid to the corporation. . . . Proceeds shall include unsold instant tickets received by a lottery retailer and cash proceeds of the sale of any lottery products, net of allowable sales commissions and credit for lottery prizes." (Emphasis added).

O.C.G.A. § 50-27-21(a). The Lottery Act also requires retailers to deposit all lottery proceeds in a separate trust account, which "[a]t the time of such deposit, lottery proceeds shall be deemed to be the property of the corporation." O.C.G.A. § 50-27-21(b) (emphasis added).

It is clear that O.C.G.A. § 50-27-21 creates a statutory trust in favor of GLC. Therefore, the Court must determine whether the Bankruptcy Court correctly found that the funds transferred to GLC during Weeks I through IV were subject to the statutory trust.

Appendix B

This Court agrees with the Bankruptcy Court's analysis and conclusions, which were based in part upon the United States Supreme Court's decision in *Begier v. IRS,* 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990). In *Begier,* the United States Supreme Court conducted an in-depth analysis of an avoidance action when the payments sought to be recovered for the debtor's estate were made on account of a statutory trust obligation of the debtor for the benefit of the Internal Revenue Service ("IRS"). In *Begier,* an airline fell behind in its pre-petition trust-fund tax payments to the IRS. These consisted of both excise taxes that were collected by the debtor airline and employment taxes that were withheld by it. The debtor was ordered by the IRS to deposit all future taxes into a separate bank account. The airline established the account, but failed to deposit all trust-fund tax payments into that account; instead, debtor remained current on its obligations by paying the taxes both from the separate bank account and from commingled funds in its general operating accounts. The airline filed for bankruptcy relief under Chapter 11; the case was converted to Chapter 7; and the bankruptcy estate's trustee subsequently brought an action to recover the amount paid by the debtor within the 90 days preceding the bankruptcy filing, including the tax payments made out of commingled funds in the airline's general operating accounts, as a preferential transfer under Section 547.

The Supreme Court, in its analysis of Section 547 of the Bankruptcy Code, found that if the debtor does not own an equitable interest in property it holds in trust for another, that interest is not "property of the estate" as defined in 11 U.S.C. § 541 and as applied in 11 U.S.C. § 547. *Id.* at 59 n.3.

Appendix B

In *Begier,* the Supreme Court relied on the language of the Internal Revenue Code to support its finding that a trust existed when a person collected a tax for the IRS. 496 U.S. at 55-56, 59. Section 7501 of the Internal Revenue Code states: "[w]henever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States." Section 7512(b) of the Internal Revenue Code further clarifies the trust relationship:

> Any person who is required to collect, account for, and pay over any tax . . . shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account . . . [and] any such account shall be designated as a special fund in trust for the United States. . . .

The statutory language governing the Georgia Lottery is remarkably similar to the language contained in the Internal Revenue Code and specifically delineates the parameters of the trust relationship between the Georgia Lottery and a Retailer, i.e., Suwannee Swifty. Likewise, the Lottery's trust applies to the amount collected from the sale of its tickets, net of credits, allowances and commissions to which the retailer is entitled. The Supreme Court in *Begier* found that the trust arose when a person collected funds for the IRS regardless of whether the collector segregated the funds from its other assets. *Id.* at 60-61. As stated by the Supreme Court:

> The fact that [the debtor] neither put the taxes in a segregated fund nor paid them to the IRS does not somehow mean that [the debtor] never collected or withheld them in the first place. Mandating segregation as a prerequisite to the creation of a trust under § 7501 [of the IRS Code] would make § 7512's requirement that funds may be segregated in special and limited circumstances superfluous and would mean that [a debtor] could avoid the creation of a trust simply by refusing to segregate.

Id. at 54.

The Supreme Court then turned to the issue of whether the assets used by the debtor to pay the IRS were assets belonging to the trust. *Id.* Because the statutory trust was in the amount collected or withheld as opposed to a trust *res* under a common law trust, such as a non-statutory trust, common-law tracing rules were determined by the Court to be unhelpful in this analysis. *Id.* at 62-63. Relying on legislative history in the 1978 revision of Bankruptcy Code[6], the Supreme Court stated that the IRS would have to show some nexus between the statutory trust and the assets to be applied to the debtor's trust-fund obligation. *Id.* at 65-66.

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6. The legislative history related to a determination of whether trust funds were considered "property of the estate," a debate spurred by the 1971 Supreme Court decision of *United States v. Randall*, 401 U.S. 513 (1971), a case dealing with a post-petition transfer of property to discharge trust-fund tax obligations that the debtor had accrued pre-petition. The revisions to the Bankruptcy Code in 1978 were intended to overrule *Randall*, in which case the Supreme Court avoided the post-petition payment of pre-petition trust funds.

Specifically, the Supreme Court adopted a "literal reading" of H.R. Rep. No. 95-595, U.S. Code Cong. & Admin. News 1978, p. 6329, which states:

> A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code § 7501(a), and thus will not be a preference because the beneficiary of the trust, the taxing authority, is in a separate class with respect to those taxes, *if they have been properly held to payment, as they will have been if the debtor is able to make the payments.* (emphasis added)

Accordingly, the Supreme Court found that "the limitation that the funds must 'have been properly held for payment' is satisfied 'if the debtor is able to make the payments.' " *Begier,* 496 U.S. at 66. The Court concluded that "[t]he debtor's act of voluntarily paying its trust-fund tax obligation therefore is alone sufficient to establish the required nexus between the 'amount' held in trust and the funds paid." *Id.* at 66-67.

This Court has already determined, as did the Bankruptcy Court, that the Debtor collected the trust funds. It is also apparent that the transfers were voluntary. Therefore, following the rationale expressed by the Supreme Court in *Begier,* the Court finds that a conclusive presumption arises that the transfers to the GLC, which Suwannee Swifty now seeks to recover, were funds held in trust for the Georgia Lottery and were not property of the Debtor's bankruptcy estate. Accordingly, the Bankruptcy Court correctly concluded that Suwannee Swifty could not recover the funds

it voluntarily deposited into the GLC Trust Account because those funds were property of the GLC, and not the bankruptcy estate.[7]

CONCLUSION

Based on the foregoing, this Court affirms the Bankruptcy Court's order granting summary judgment to the GLC and denying summary judgment to Suwannee Swifty.

IT IS SO ORDERED, this 24th day of May, 2002.

s/ Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

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7. The fact that the deposits into the GLC Trust Account may have been made by mistake does not alter this conclusion. *See Georgia Lottery Corp. v. First Nat'l Bank of Grady*, 253 Ga. App. 784 (2002).

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF GEORGIA, THOMASVILLE DIVISION DATED AND FILED MAY 17, 2001

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CASE NO. 96-60807

CHAPTER 11

ADVERSARY PROCEEDING NO. 98-6078

IN RE:

SUWANNEE SWIFTY STORES, INC.,
EIN: 58-0434460

Debtor.

SUWANNEE SWIFTY STORES, INC.,

Plaintiff,

v.

GEORGIA LOTTERY CORPORATION,

Defendant.

Appendix C

MEMORANDUM OPINION

On September 21, 2000, the court held a hearing on cross motions for summary judgment regarding Debtor's complaint against Georgia Lottery Corporation ("GLC") to recover post-petition transfers under § 549 and § 550 of the Bankruptcy Code ("Code"). The parties filed briefs, reply briefs, affidavits, and a final pretrial order. At the conclusion of the hearing, the court took the motions for summary judgment under advisement. The court has considered the evidence, affidavits, and the parties' briefs and oral arguments, as well as the applicable statutory and case law. For reasons that follow, the court will grant GLC's motion for summary judgment and will deny Debtor's motion for summary judgment. Accordingly, the court will not allow Debtor to recover the post-petition transfers.

FACTS

Debtor operated approximately 109 retail stores in South Georgia and North Florida. Seventy of these stores were located within the state of Georgia. On September 17, 1993, Debtor entered into a Retailer Contract with GLC for the sale of On-Line lottery tickets in connection with the State of Georgia's Lottery. On October 19, 1994, Debtor entered into another Retailer Contract with GLC for the sale of Instant Game lottery tickets ("Instant Tickets"). In addition to the terms of each contract, the course of dealings between Debtor and GLC were governed by the Georgia Lottery for Education Act ("Lottery Act"). O.C.G.A. § 50-27-1 (1982 & Supp. 2000) *et seq.* Pursuant to the Lottery Act, GLC may establish rules, policies, and procedures regulating the conduct of lottery games. O.C.G.A. § 50-27-10.

Appendix C

On December 12, 1996, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On December 11, 1998, Debtor filed this adversary proceeding. Only the Instant Ticket transactions are at issue in this proceeding. Therefore, the procedure by which the Instant Tickets were provided to and sold by Debtor is pertinent to the analysis.

Pursuant to GLC's Policies and Procedures, Instant Tickets are delivered to the retailer in packs which are assigned a bar code so that the retailer can scan them for status purposes. Upon shipment to the stores, but before they are delivered, Instant Ticket packs maintain the status of "Issued." An "Issued Pack" is one which has been assigned and shipped to a specific retailer. Once a pack has been delivered, the retailer is required to scan the pack thereby changing the status from "Issued" to "Confirmed." Scanning is done with a bar code reader at the retailer's location which is connected on-line to GLC. "Confirmation" of a pack is absolute proof that the retailer has received the pack from GLC.

Prior to the sale of an individual Instant Ticket from a "Confirmed" pack, the retailer is again required to change the status of the pack from "Confirmed" to "Activated." This is done by scanning the pack a second time. An "Activated" pack indicates to GLC that Instant Tickets are being sold from that pack.

The status of an "Activated" pack changes to "Settled" on the earlier of either (1) 21 days after "Activation"; or (2) the date the retailer consciously makes a choice to "Settle" a pack, whether the Instant Tickets have been sold or not. A "Settled" pack enables GLC to bill (or "Settle") the retailer's account.

Appendix C

The Lottery Act and the Retailer Contract also require that the retailer maintain a separate Trust Account at Bank of America ("BOA") to deposit proceeds from the sale of Lottery tickets. O.C.G.A. § 50-27-2. On the Tuesday following any fiscal week, which ran from Sunday through Saturday, GLC electronically sweeps the Instant Total[1] and On-line Total from the account. The Lottery Act and regulations further require the retailer to deposit proceeds into this Trust Account no later than the next business day after the sale of the Instant Tickets.

However, Debtor did not deposit the proceeds from the sale of Instant Tickets on a daily basis, a fact which is not in dispute. Although Debtor maintained a separate Trust Account at BOA located in Albany, Georgia, each of Debtor's retail stores maintained a separate "store account" in the community where the store was located. Each store deposited all of its general receipts as well as proceeds from lottery ticket sales into its store account. On the day prior to GLC's weekly sweep of the Trust Account, GLC routinely advised Debtor, by facsimile, of the amount that was going to be swept. Upon receipt of this weekly facsimile from GLC, Debtor withdrew funds from other accounts and deposited into the Trust Account the amount to be swept.

During the fiscal week covering the period that Debtor filed its voluntary petition, commencing December 8, 1996

1. The *Instant Total* is the amount swept each week which represents the amount "Settled" less *Returns* (tickets returned to GLC by Debtor), less *Validations* (cash payments to winners), less *Sales Commissions* (Debtor's commission for selling tickets), less *Cashing Commissions* (Debtor's 2% commission for cashing winning tickets).

and ending on December 14, 1996, ("Week I"), Debtor "settled" $201,600.00 in Instant Ticket sales. During Week I, Debtor was credited with $13,133.00 for Returns, $114,060.00 for Validations, $9,840.30 for Sales Commissions, and $2,281.20 for Cashing Commissions. ("applicable credits"). Accordingly, the amount to be swept for Instant Tickets was $62,285.50.[2] This sweep failed because of the lack of funds in the Trust Account. (Pretrial Order Exh. "D").

Because Debtor filed its voluntary petition on December 12, 1996, both Debtor and GLC agreed to pro-rate Instant and On-line Ticket sales as of the close of business on December 11, 1996. (Stipulation of Facts, Doc. No. 58). Of the $158,864.24 due to GLC, $72,186.74 was due for the period of December 8, 1996 through December 11, 1996. Therefore, on December 18, 1996, Debtor wire transferred to GLC $86,677.50 out of its general operating account. This left a balance of $72,186.74.[3]

Between December 15, 1996 and December 21, 1996, ("Week II"), Debtor settled $191,700.00 in Instant Tickets. After the applicable credits were applied, a balance due of

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2. The Instant Total amount added to $96,578.74, the On-line Total for that week, resulted in $158,864.24; the total amount to be swept on that date. Also, on January 30, 1997, Thomas A. Schroeder, an in-house attorney with GLC, transmitted a facsimile to Debtor's Chief Operating Officer, Wayne Boone, detailing Instant and On-line transactions for Week I.

3. Of the $72,186.74, $29,711.34 was on account of Instant Tickets and $42,475.40 was on account of On-line Tickets. (Pretrial Order, Exh. "E").

$61,902.48 resulted, which GLC swept from the Trust Account on December 24, 1996.

During the next fiscal week commencing on December 22, 1996 and ending on December 28, 1996, ("Week III"), Debtor settled $193,800.00 in Instant Ticket Sales. The amount of $68,785.02 was the resulting balance due after applicable credits were applied. On December 31, 1996, GLC swept this amount from the Trust Account.

Between December 29, 1996 and January 1, 1997, ("Week IV"), $107,100.00 in Instant Tickets were settled. After applicable credits were applied, a balance of $43,904.22 resulted which was swept from the Trust Account by GLC on January 7, 1997. Although Week IV is not a full week, January 1, 1997 was the last day of the 21-day period for which any Instant Ticket packs that were activated pre-petition could have been settled. However, neither party can point to any evidence indicating to what extent Instant Tickets, which were activated pre-petition, were sold pre-petition or post-petition. (Pretrial Order, pp. 17).

On December 17, 1996, the court entered an order allowing Debtor to use cash collateral to pay operating expenses, which included disbursements to GLC. (Doc. No. 39). On January 6, 1997, the court entered a similar order Authorizing Continued Use of Cash Collateral. (Doc. No. 100). This latter order expired on January 23, 1997.

On December 24, 1996, after a preliminary hearing on Debtor's Motion to Assume Executory Contracts, the court entered an order allowing Debtor to continue selling lottery

tickets under its contract with GLC. (Doc. No. 67). In this order, the court found that Debtor owed GLC "approximately $73,000.00" for pre-petition lottery sales. *Id.* Similarly, on March 3, 1997, the court entered an Interim Order allowing Debtor to operate as a lottery retailer. (Doc. No. 266). Furthermore, this order set Plaintiff's total pre-petition arrearage to GLC at $72,187.00. *Id.*

On December 11, 1998 Debtor filed its complaint to recover post-petition transfers. Debtor asserts that funds transferred to GLC during Weeks I through IV were on account of pre-petition Instant Ticket sales. Because Instant Tickets are not settled until 21 days after they are activated, Debtor maintains that any Instant Tickets settled during this time period were activated (i.e., sold) pre-petition. Based on this, Debtor contends that the pre-petition arrearage owed to GLC on account of Instant Ticket sales is $562,787.06, not $29,711.34. Accordingly, Debtor maintains that $533,075.72 was erroneously paid which is recoverable as property of the estate.

GLC contends that the pre-petition arrearage amount of $72,186.74, of which $29,711.34 was on account of Instant Tickets, is the correct figure. GLC maintains that this pre-petition figure was determined by the court in its March 3, 1997 order. Moreover, all post-petition transfers were on account of post-petition sales which were authorized by the court. Furthermore, it is GLC's position that all Instant Tickets and the proceeds from the sale of Instant Tickets are property of a trust and therefore, cannot be property of the estate. Debtor, however, maintains that any trust character was destroyed due to the commingling of the ticket sales proceeds with its stores' general receipts.

Appendix C

DISCUSSION

In dealing with cross motions for summary judgment in a contested matter, Federal Rule of Bankruptcy Procedure 9014 incorporates Federal Rule of Bankruptcy Procedure 7056, which in turn incorporates Federal Rule of Civil Procedure 56. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c). An issue is "material" if it affects the outcome of the case under the applicable law. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In this case, the applicable law is § 549 and § 550 of the Code. Under those sections, only the transfer of property of the estate may be avoided and recovered. Therefore, the central issue to be determined by the court is whether the post-petition transfers to GLC on December 18, 1996, December 24, 1996, January 7, 1997, and January 14, 1997, were subject to a trust, thus excluding the transfers from the property of the estate. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n.10 (1983)(noting that property held in trust for a third party does not become property of the estate).

In determining whether the transferred funds were subject to a trust, the court must first determine whether a trust existed. This inquiry requires looking to the language of the Lottery Act, which provides in part:

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> All proceeds from the sale of lottery tickets or shares shall constitute a trust fund until paid to the corporation. . . . Proceeds shall include unsold instant tickets received by a lottery retailer and cash proceeds of the sale of any lottery products, net of allowable sales commissions and credit for lottery prizes.

O.C.G.A. § 50-27-21(a). The Lottery Act also requires retailers to deposit all lottery proceeds in a separate trust account, which "[a]t the time of such deposit, lottery proceeds shall be deemed to be the property of the corporation." O.C.G.A. § 50-27-21(b).

The court finds that O.C.G.A. § 50-27-21(a) creates a statutory trust in favor of GLC. *See Georgia Lottery Corporation v. Daniel (In re Daniel)*, 225 B.R. 249, 251-52 (Bankr. N.D. Ga. 1998) (holding that § 50-27-21 sets forth all the elements of a technical trust). As far as what constitutes property held in trust for GLC, the plain language of O.C.G.A. § 50-27-21(a) is clear. "All proceeds . . . shall constitute a trust . . . [and] [p]roceeds shall include unsold instant tickets received by a lottery retailer and cash proceeds . . . net allowable sales commissions and credit[s]. . . ." O.C.G.A. § 50-27-21(a). Because GLC's Policies and Procedures define "Confirmed" Instant Tickets as absolute proof that the retailer has received the tickets, the courts finds that, in addition to tickets sold, all tickets "Confirmed" constitute property held in trust. Next, the court must determine whether the funds transferred to GLC during Weeks I through IV were subject to the statutory trust.

Debtor argues that any trust character of the funds was destroyed when Debtor commingled Instant Ticket sales proceeds with Debtor's general store account funds. Debtor further asserts that the trust fails because there is no identifiable trust res. Research has produced no cases on this precise point. Therefore, this is an issue of first impression for the court. However, the court agrees with GLC and finds that *Begier v. Internal Revenue Service* is instructive. 496 U.S. 53 (1990).

In *Begier*, the United States Supreme Court analyzed an avoidance action as to payments that were made to the Internal Revenue Service ("IRS") pursuant to a statutorily created trust in the tax code. Affirming the Third Circuit, the Supreme Court held that the funds paid to the IRS were not property of the debtor; they were held in trust for the IRS. *Id.* at 55. Accordingly, the Court held that the trustee could not recover the funds. *Id.*

At the onset, the court disagrees with Debtor that *Begier* is inapplicable in this case. Admittedly, the court recognizes that *Begier* involved a trust created by the tax code and the Bankruptcy Code gives special attention to taxes. However, that fact is inconsequential in this analysis. The central underlying issue in *Begier*, whether such transfers were property of the debtor, is directly applicable to this court's determination of whether Debtor's transfers were property of the estate. *See id.* at 65 (explaining that " 'property of the debtor' is property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings."). Moreover, the mere fact that *Begier* dealt with alleged preferential pre-petition transfers under § 547 of the Code and the present case deals with

§ 549 post-petition transfers, has no bearing on the property of the estate analysis.

American International Airlines ("AIA"), the debtor in *Begier*, fell behind in its pre-petition "trust fund taxes" to the IRS.[4] Pursuant to § 7512 of the Internal Revenue Code, the IRS subsequently ordered AIA to deposit the trust fund taxes in a separate account because of AIA's default. AIA established the account but instead of depositing into the separate account all of the funds that it collected, AIA commingled some of the trust fund taxes with general operating funds. Nonetheless, AIA remained current to the IRS by making payments from both the separate account and its general operating funds. *Id.* at 56.

Relying on the language of § 7501 of the Internal Revenue Code, the Supreme Court held that the statutory trust extends to "the amount of tax so collected or withheld." *Id.* at 60. AIA was required to withhold incomes taxes from its employees' pay and collect excise taxes from its customers for the benefit of the IRS. Therefore, the Court held that a trust in the amount withheld or collected was created at the moment AIA paid its employees and at the moment customers paid AIA. *Id.* at 61. The trustee argued that no trust was created because AIA never segregated the funds into a separate account. However, the Supreme Court rejected this argument and held that nothing in § 7501 indicates an intent

4. Pursuant to § 7501 of the Internal Revenue Code, excise taxes collected from customers and income taxes withheld from another's pay, "shall be held to be a special fund in trust for the United States." 26 U.S.C. § 7501. Therefore, these taxes are often called "trust fund taxes." *See Slodov v. United States*, 436 U.S. 238 (1978).

of Congress that the IRS is "protected only insofar as dictated by the debtor's whim." *Id.* If the trustee's proposition were true, the Court noted that an "employer could avoid the creation of a trust simply by refusing to segregate." *Id.*

This conclusion, however, did not fully resolve the issue of whether the funds transferred from AIA's general operating fund were trust property. Looking to the common law of trusts, the Court explained that a trust is created in property which comes into being only upon the identification of trust property or trust res. *Id.* However, the Court found the common law definition to be "unhelpful" given the fact that a trust created under § 7501 creates a trust in an abstract "amount" instead of in particular property. *Id.* Therefore, the Court determined that the IRS must "show some connection ('reasonable assumption') between the § 7501 trust and assets sought to be applied to debtor's trust-fund tax obligations." *Id.* at 65-66. In other words, there must be some nexus between the trust and funds transferred in order for the transferred funds to be excluded from property of the estate. The Court concluded that the voluntary payment of trust fund taxes, regardless of the source of the funds, provides the necessary nexus. *Id.* at 66-67.

In the present case, Debtor argues that the "nexus" espoused in *Begier* is a presumption which is rebuttable. *See Wendy's Food Systems, Inc. v. State of Ohio Dep't of Taxation (In re Wendy's Food Systems)*, 133 B.R. 917 (Bankr.S.D.Ohio 1991). However, a bankruptcy court in this jurisdiction has held that a debtor's voluntary payment conclusively establishes the nexus set forth in *Begier. See Wasden v. Florida Dep't of Revenue (In re Wellington Foods, Inc.)*, 165 B.R. 719 (Bankr.S.D.Ga.1994).

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In *In re Wendy's Food Systems ("WFS")*, the debtor, WFS, was required to collect state sales taxes which were to be held in trust pursuant to Ohio law. During the pre-petition preference period, WFS made a voluntary payment to the taxing authority. WFS sought to recover these payments. Because the taxes which WFS collected were commingled with general operating funds, the state taxing authority argued that *Begier* was applicable.

Construing *Begier*, the bankruptcy court held that the "reasonable assumption" (or presumption) that a voluntary payment provides the required nexus to the trust, may be rebutted with contrary evidence. *Wendy's Food Systems*, 133 B.R. at 920. According to the court in *Wendy's Food Systems*, the Supreme Court in *Begier* rendered a narrow ruling specific to the facts of that case. *Id.* at 921. The court explained that the voluntary payment in *Begier* was presumed to provide the nexus to the trust because there was a sufficient amount of funds in the commingled account to satisfy the tax obligation. *Id.* However, in *Wendy's Food Systems*, WFS's commingled account had a balance below the amount which was transferred to the taxing authority. The court held that this "distinction remove[d] the reasonableness from the assumption created in *Begier*." *Id.* The court read *Begier* as requiring the commingled account to have a balance equal to or greater than the amount transferred in order for a voluntary payment to have a sufficient nexus to the trust. Moreover, to the extent that the transferred amount is greater than the commingled account balance, that amount is not property of the trust therefore, rendering it avoidable by WFS. *Id.* at 921-22.

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In the case before the court, Debtor argues that *Wendy's Food Systems* is applicable. Evidence presented demonstrates that Debtor's store accounts and concentration accounts had negative balances at all times relevant to the transfers. (GLC's Br. Exh. "G"). Relying on *Wendy's Food Systems*, Debtor maintains that this evidence rebuts the presumption that Debtor's voluntary payment to GLC was sufficiently connected to the trust.

The court in *In re Wellington Foods*, however, rejected the holding in *Wendy's Food Systems* that *Begier* was a narrow decision limited to specific facts. 165 B.R. at 726. In *Wellington Foods*, Chief Judge Davis recognized the holding of *Wendy's Food Systems* to be the common-law tracing doctrine known as the "lowest intermediate balance." *Id.* Although the Supreme Court was not faced with an intervening balance issue in *Begier*, Judge Davis held that *Begier* is not restricted to cases where the debtor has sufficient funds in its accounts to cover trust fund tax payments. *Id.* To Judge Davis, this point was clear given the Supreme Court's language that the voluntary payment could not be avoided "regardless of the source of the funds." *Id.* (citing *Begier*, 496 U.S. at 66-67). Therefore, the court held that "the conclusive presumption arises upon voluntary payment, regardless of the source of the payment and regardless of any intervening balance in the debtor's aggregate operating accounts." *Id.*

The court in *Wellington Foods* further supported its conclusion by relying on two cases involving trust fund

taxes.[5] In each case, the court applied the "lowest intermediate balance" test. However, the debtors in both of these cases did not make a voluntary payment. As Judge Davis explained, the voluntary payment "is a critical factual distinction [which goes to] . . . the very heart of the Supreme Court's opinion in *Begier*. . . ." Furthermore, the Supreme Court made a reference to *In re R & T Roofing* and noted that case as being merely "related" to the issue before the Court because it did not involve a voluntary payment. *Id.* (citing *Begier*, 496 U.S. at 57, n.12).

Therefore, absent the act of making a voluntary payment, the court held that there is no conclusive presumption of the required nexus, thus the lowest intermediate balance rule is applicable. *Id.* at 728. However, where a voluntary payment has been made, "such payment will be conclusively presumed to be from the corpus of the trust." *Id.*

The court agrees with the reasoning in *Wellington Foods* and likewise, finds that a voluntary payment conclusively presumes that such payment is property of the trust. Accordingly, the court rejects the reasoning in *Wendy's Food Systems* that this presumption is rebutted because the trust account balance fell below the amount of the payment. As the Supreme Court in *Begier* held, the trust is created in an "abstract amount" and "regardless of the source of the funds." *Begier* at 62, 66-67.

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5. *See United States v. Daniel (In re R & T Roofing Structures & Commercial Framing, Inc.)*, 887 F.2d 981 (9th Cir.1989); *In re Copeland Enterprises, Inc.*, 133 B.R. 837 (Bankr. W.D. Tex.1991) *aff'd*, 991 F.2d 233 (5th Cir.1993).

Moreover, the "conclusive presumption" of a voluntary payment is consistent with the presumption applied in constructive trust cases where the trustee commingles trust funds with that of his own.[6] *See Bethlehem Steel Corp. v. Tidwell*, 66 B.R. 932, 942 (M.D. Ga. 1986)(holding that "[w]hen a trustee replenishes a commingled account which has fallen below the amount held in trust, the trustee is presumed to return the beneficiary's money first. . . ."). Just as funds that replenish a commingled account are presumed to be trust property (i.e., beneficiary's property), funds that are voluntarily paid to the trust beneficiary are likewise presumed to be trust property.

Applying the rule in *Begier* to the instant case, the court finds that the funds which Debtor transferred post-petition to GLC were property of the statutory trust. Although Debtor transferred these funds from its commingled general operating accounts, these payments were voluntary payments. Therefore, pursuant to *Begier* and *Wellington Foods*, these payments are conclusively presumed to be sufficiently connected to the trust. No doubt exists that a voluntary payment was made for Week I; once the sweep failed, Debtor wire transferred the funds directly to GLC. During Weeks II, III, and IV, however, Debtor made deposits in the trust account which was swept by GLC. Nevertheless, the court finds that these transfers were voluntary. Just because Debtor did not directly transfer the funds to GLC, Debtor voluntarily

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6. Although constructive trusts are formed as an equitable remedy while statutory trusts are creatures of statute, the court finds that this distinction is immaterial in determining what constitutes trust property.

deposited the funds in the Trust Account in order for GLC to conduct the sweep.

Moreover, these facts are similar to *Bethlehem Steel.* The commingled account in that case had very little funds which was later replenished by the debtor with other funds. The court held that the replenished funds were presumed to be property of the trust. 66 B.R. at 942. Similarly, the Trust Account in the instant case had no funds. Debtor deposited funds in order for GLC to conduct the sweeps. Pursuant to the presumption of *Bethlehem Steel*, the court finds that the deposits constitute replenished funds which are property of the trust.

Based on the above findings, the $533,075.72 which Debtor maintains was erroneously paid to GLC, are "proceeds" held in trust for GLC. These funds are not property of the estate. Accordingly, Debtor may not recover these funds under § 549 and § 550 of the Code. Therefore, the court will grant GLC's motion for summary judgment and will deny Debtor's motion for summary judgment.

GLC prayed for an award of attorney's fees, but has cited no authority in support of the same. Therefore, judgment will be rendered in favor of GLC and against Debtor with costs of this action.

An order in accordance with this Memorandum Opinion will be entered.

Appendix C

DATED this 17th day of May, 2001.

s/ John T. Laney, III
John T. Laney, III
UNITED STATES BANKRUPTCY JUDGE

Appendix C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CASE NO. 96-60807

CHAPTER 11

ADVERSARY PROCEEDING NO. 98-6078

IN RE:

SUWANNEE SWIFTY STORES, INC.,
EIN: 58-0434460

Debtor.

SUWANNEE SWIFTY STORES, INC.,

Plaintiff,

v.

GEORGIA LOTTERY CORPORATION,

Defendant.

Appendix C

ORDER

In accordance with the Memorandum Opinion issued this date, the court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment. Accordingly, judgment is rendered in favor of Defendant and against Plaintiff, together with the costs of this action.

ORDERED this 17th day of May, 2001.

s/ John T. Laney, III
John T. Laney, III
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED AUGUST 22, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13732-CC

In Re: SUWANNEE SWIFTY STORES, INC.,

Debtor.

SUWANNEE SWIFTY STORES, INC.,

Plaintiff-Appellant,

versus

GEORGIA LOTTERY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, F.2d __).

Appendix D

Before: BIRCH, HULL, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

---

* Honorable B. Avant Edenfield, United States District Judge for Southern District of Georgia, sitting by designation.

APPENDIX E — STATUTE INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III—THE ESTATE

11 U.S.C. § 549

§ 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement

of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of—

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

(2)

No. 03-816

Supreme Court, U.S.
FILED
FEB 4 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SUWANNEE SWIFTY STORES, INC.,

Petitioner,

v.

GEORGIA LOTTERY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Should this Court grant certiorari to review the Circuit Court's disposition of Petitioner's appeal, affirming the District Court's decision which affirmed the decision of the Bankruptcy Court granting summary judgment to Respondent, based on the determination that the funds transferred were not recoverable under 11 U.S.C. § 549 because they were voluntarily transferred and were not property of the bankruptcy estate?

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PART I.

STATEMENT OF THE CASE

Petitioner is a debtor in bankruptcy having filed a Chapter 11 bankruptcy petition in the Bankruptcy Court for the Middle District of Georgia on December 12, 1996. On December 11, 1998, Petitioner filed a Complaint under 11 U.S.C. § 549 seeking to recover post petition transfers that it made to Respondent, the Georgia Lottery Corporation. After the parties filed a stipulation of facts and cross-motions for summary judgment, the Bankruptcy Court for the Middle District of Georgia denied Petitioner's motion and granted the Respondent's motion. The Bankruptcy Court determined that the funds transferred to the Respondent could not be recovered under 11 U.S.C. § 549 because they were held in trust by Petitioner for Respondent and were not property of the bankruptcy estate. Pet. App. C. Petitioner appealed to the District Court for the Middle District of Georgia which affirmed the Bankruptcy Court's decision by also determining, like the Bankruptcy Court, that the funds transferred were held in trust for Respondent and were not property of the estate. Pet. App. B. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On April 28, 2003, the Eleventh Circuit affirmed the decision of the District Court without opinion. Pet. App. A. Petitioner sought rehearing and rehearing en banc which the Eleventh Circuit denied. Pet. App. D. Petitioner has submitted a timely petition for a writ of certiorari to this Court.

Petitioner's Complaint against Respondent involved instant Georgia Lottery tickets ("Lottery tickets"). Instant Lottery tickets are paper tickets that are immediately available for play when purchased. They are sold to

customers who then "scratch-off" a substance on the tickets revealing winning numbers or other information.

The Petition sets forth a number of facts. Respondent addresses certain factual statements of Petitioner below. The Opinions of the Bankruptcy Court and the District Court that are included in the Appendix to the Petition set forth the facts relevant to this case. Respondent provides some factual discussion herein to address the facts set forth in the Petition.

Petitioner filed its bankruptcy petition on December 12, 1996. Petitioner's sales of Lottery tickets was an immediate issue. In the Petition, Petitioner implies that it was somehow confused or mislead by a facsimile from an attorney employed by Respondent dated January 30, 1997 which Petitioner characterizes as "shortly following the filing of the Bankruptcy Case." Pet. 6. Petitioner asserts that it relied on the calculations contained in this facsimile in agreeing "that the amounts due during Week I to the GLC for *both* Instant Ticket and On-Line ticket sales were to be prorated as of the close of business on December 11, 1996." Pet. 6. This alleged reliance by Petitioner is simply inconsistent with the findings below.

Petitioner also sets forth a timeline regarding how sales of Lottery tickets were addressed in Petitioner's bankruptcy case. Pet. 8-9. Respondent submits that this timeline omits several relevant events.

Petitioner filed its bankruptcy case on December 12, 1996. As set forth in the Order of the District Court in this case, Petitioner and Respondent agreed to prorate the amount to be paid over to Respondent for the week of December 8-14, 1996 as of the close of business on December 11, 1996. Pet. App. B 7a-8a. On December 18th,

Petitioner wire transferred to Respondent the sum of $86,677.50 leaving a balance due pre-petition of $72,186.74. Pet. App. B 8a. Thus, the arrangement with respect to prorating the amount to be paid over for the week of December 8-14, 1996 was agreed to and paid over to Respondent more than a month before the facsimile of January 30, 1997 to which Petitioner devotes so much discussion.

A number of other events occurred immediately after the filing of the bankruptcy case. On the same day that it filed bankruptcy, Petitioner filed an Emergency Application for Authority to Use Cash Collateral and Grant Replacement Lien which included a request that the Petitioner be permitted to make disbursements to Respondent. Pet. App. B 10a. On December 17, 1996, the Bankruptcy Court entered an Order authorizing weekly disbursements for the first four weeks of the case to the lotteries of Georgia and Florida not to exceed $215,000 per week. Pet. App. B 10a; Pet. App. C 25a. Thus, five days into the case, Petitioner had obtained authority by way of Court Order to make disbursements to Respondent. On December 19, 1996, Petitioner filed an Emergency Motion to Assume Executory Agreement with Respondent wherein it sought to pay over to Respondent the $72,186.74 which had not been paid as the result of prorating the week of December 8-14, 1996. Pet. App. B 10a. After a preliminary hearing on this Motion, the Bankruptcy Court found that the amount owed Respondent as of the petition date was 'approximately $73,000 for pre-petition lottery sales' and authorized Petitioner to continue selling Lottery tickets under its agreement with Respondent. Pet. App. B 10a; Pet. App. C 25a-26a. On January 6, 1997, the Bankruptcy Court entered another Order authorizing continued use of

cash collateral which authorized weekly disbursements to the Georgia and Florida Lotteries through January 23, 1997 in amounts averaging $212,000 per week. Pet. App. B 10a n. 4; Pet. App. C 25a.

On February 13, 1997, the Bankruptcy Court held a formal hearing on Petitioner's Motion to Assume its Contract with Respondent. Pet. App. B 10a. At this hearing, Petitioner, through its counsel and testimony of two of its officers stated that the amount due Respondent for pre-petition sales was $72,187.00. Pet. App. B 10a-11a. Petitioner's counsel further stated that the funds to be paid to Respondent, other than for the pre-petition arrearage claim, would be the Respondent's trust funds. Pet. App. B 11a. Thus, fourteen days after the facsimile of January 30th, Petitioner still took the position that the funds being paid to Respondent were Respondent's trust funds.

On March 3, 1997, the Bankruptcy Court entered an Order reserving judgment on Petitioner's Motion to assume its contract with Respondent. Pet. App. B 11a. It is interesting to note that Petitioner now seeks to characterize this Order as denying its Motion to assume its contract with Respondent. Pet. 9. The Order of March 3, 1997 also allowed Petitioner to continue to operate as a retailer of Lottery tickets with Respondent. Pet. App. B 11a; Pet. App. C 26a. The Order of March 3, 1997 specifically set Respondent's total pre-petition claim at $72,187.00 without the necessity of Respondent filing a proof of claim and prohibited Petitioner from making payment of such claim. Pet. App. B 11a; Pet. App. C 26a. The Order of March 3, 1997 included additional provisions. Petitioner was authorized to continue to operate as a Georgia Lottery Retailer and was required to comply with its contract with Respondent, the rules and regulations of Respondent and

the Georgia Code. Pet. App. B 12a; Pet. App. C 26a. The Order also found that upon deposit into the Georgia Lottery Concentration Account, the monies received by Petitioner from the sale of Georgia Lottery tickets became the property of Respondent. Pet. App. B 12a. The transfers to Respondent on December 24, 1996, December 31, 1996 and January 7, 1997 came from Petitioner's Georgia Lottery Account. Pet. App. B 9a.

Respondent has not been paid anything toward its $72,187.00 pre-petition claim. Pet. App. B 12a.

On December 11, 1998, more than a year and a half after the Court entered the aforementioned orders and after Petitioner enjoyed the substantial benefits of continuing as a Lottery retailer until its stores were sold and it no longer needed the Lottery, Petitioner filed a complaint to recover alleged unauthorized post-petition transfers under 11 U.S.C. § 549 against Respondent.

Petitioner subsequently filed an amended complaint which sought, among other things, reconsideration of the Bankruptcy Court's Order of March 3, 1997. Petitioner realized that the March 3, 1997 Order, among others, authorized, or reaffirmed the validity of, the post petition transfers to Respondent and, therefore, had to be changed in order for it to prevail. The Order has never been changed in any way. Thus, the transfers were authorized.

In its Petition, Petitioner asserts several issues that it claims merit the grant of a writ in this case. First, Petitioner asserts that the Eleventh Circuit erred in affirming the District Court because Petitioner argues that the funds transferred to Respondent were property of the estate and no trust nexus existed between the funds transferred and the statutory trust in favor of Respondent.

Second, Petitioner asserts that the Eleventh Circuit erred in determining that the issues presented in this case are governed by, or analogous to this Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990). Third, Petitioner asserts that the decision in this case undermines federal bankruptcy court jurisdiction. Fourth, Petitioner asserts that Respondent is simply an unsecured creditor of Petitioner's bankruptcy estate.

All of Petitioner's arguments are addressed herein. None provides a basis for this Court to grant a writ of certiorari. The funds voluntarily paid to Respondent were not property of the estate as they were held in trust for Respondent. In addition, the payments were authorized by orders of the Bankruptcy Court in the early stages of Petitioner's bankruptcy case. Thus, the Courts below all appropriately ruled in favor of Respondent.

PART II.

REASONS FOR DENYING THE WRIT

I. The Circuit Court Properly Affirmed the District Court's Affirmation of the Bankruptcy Court's Determination That the Transfers in this Case Did Not Involve Estate Property.

A writ should not be granted in this case. This case has been considered below by the Bankruptcy Court, the District Court and the Eleventh Circuit. All have ruled consistently for Respondent. The rulings are entirely consistent with this Court's precedent. In seeking a writ of certiorari, Petitioner greatly exaggerates the scope of the Ruling below.

Petitioner argues that the filing of the bankruptcy case destroyed any nexus which Petitioner characterizes as essential to the lower courts' determination that the funds in issue were not property of the estate. The funds in issue in this case are the trust funds of Respondent, were never the property of Petitioner, and were voluntarily paid to Respondent. The Courts below consistently determined that the transfers were voluntary. Pet. App. B 18a; Pet. App. C 35a-36a.

As the Bankruptcy Court concluded, there is no meaningful difference, for purposes of this case, between the avoidance powers under 11 U.S.C. § 547 and 11 U.S.C. § 549 when analyzing whether the funds in issue were property of the estate. Pet. App. C 29a-30a.

There is no question that there is a trust relationship in this case. O.C.G.A. § 50-27-21. Petitioner seeks to construe 28 U.S.C. § 959 to excuse it from complying with statutory trust requirements under Georgia law as well as the requirements of court orders and its contractual obligations. Respondent notes that Petitioner did not raise this argument before the Bankruptcy Court. Therefore, the argument would not appear to be properly before this Court. Notwithstanding this fact, the construction urged by Petitioner of 28 U.S.C. § 959 makes no sense. 28 U.S.C. § 959 required Petitioner to operate its business in compliance with Georgia law.

Petitioner's essential assertion is that because it allegedly did not have possession of the Respondent's trust funds on the day it filed bankruptcy, it was somehow exempt from complying with Georgia law in the handling of those funds to which Respondent was entitled. This argument is premised on factual findings that Petitioner

was not in possession of trust funds on the day it filed bankruptcy, or that the proceeds paid to the Respondent post-petition were from sales of tickets before the bankruptcy filing. No such findings have been made in this case. The clear facts in this case as determined by the Courts below are that the parties had a trust relationship and that Petitioner voluntarily paid funds over to Respondent.

Petitioner cites no case law to support its interpretation of 28 U.S.C. § 959 because its interpretation is exactly the opposite of the purpose of the statute. The filing of a Chapter 11 bankruptcy case does not excuse a debtor-in-possession from conducting its business in accordance with state law and complying with state law requirements. In fact, 28 U.S.C. § 959(b) explicitly requires that a debtor-in-possession "shall manage and operate the property in his possession as such Trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." Georgia statutory law governed the relationship between the Petitioner and Respondent. O.C.G.A. §§ 50-27-1 et seq.

The "proceeds" which Petitioner held in trust for Respondent also included unsold tickets and not just the cash proceeds of the tickets. O.C.G.A. § 50-27-21. Furthermore, under the contractual relationship between Respondent and Petitioner, the tickets and proceeds were "property" of Respondent in the possession of Petitioner. Such property had to be used in accordance with the requirements of Georgia law.

In an attempt to argue that it did not have possession of pre-petition funds that were the subject of the state

statutory trust, Petitioner continually states that it had no funds in its accounts on the day it filed bankruptcy. However, at the time it sought authority to use cash collateral in its bankruptcy case, Petitioner represented that it had over $330,000 on the day it filed bankruptcy. Even if Petitioner had no money in its bank account on the petition date and assuming it could use 28 U.S.C. § 959 to circumvent state law, it has proved nothing because it has no evidence to show that the funds from the sale of post-petition instant tickets were insufficient to fund the post-petition transfers to the Lottery. The Courts below recognized that activation of a pack of tickets pre-petition does not show that the tickets were sold pre-petition. Pet. App. B 9a; Pet. App. C 25a.

There is no question that the proceeds from ticket sales and the unsold tickets were held in trust by Petitioner for Respondent. O.C.G.A. § 50-27-21(a); *Georgia Lottery Corp. v. First Nat'l Bank of Grady County*, 253 Ga. App. 784, 787 (2002); *Georgia Lottery Corp. v. Daniel*, 225 B.R. 249, 251-52 (Bankr. N.D.Ga. 1998); *Georgia Lottery Corp. v. Thompson*, 296 B.R. 563, 566 (Bankr. M.D.Ga. 2003). Not only was the property held in trust, the parties' agreement, the orders of the Bankruptcy Court, and Georgia law provided that upon deposit into the account maintained for Respondent, the proceeds were deemed the property of Respondent. Pet. App. B 11a-12a. O.C.G.A. § 50-27-21(b); *Grady County*, 253 Ga. App. at 787.

With little citation of authority, Petitioner asserts that the fact that the funds were transferred after the filing of Petitioner's bankruptcy petition somehow changes the analysis. As correctly determined below, this distinction is of no consequence. Pet. App. C 29a-30a. The simple fact in this case is that even if the fact of the bankruptcy filing

created some distinction, Petitioner agreed, and was ordered, to comply with the terms of its agreement with Respondent as well as the requirements of Georgia law and the regulations of Respondent, both before and after the case. Pet. App. B 10a-12a; Pet. App. C 25a-26a. In order to obtain the benefits of being a retailer after the filing, Petitioner had to turn over to Respondent the funds that it held in trust for Respondent.

Petitioner cites Bankruptcy Rule 6001 in its Petition for the proposition that Respondent has the burden to prove the validity of a transfer under 11 U.S.C. § 549. This is not the case. While the language of Rule 6001 provides that the entity asserting the "validity of a transfer" has the burden of proof, *Collier on Bankruptcy* notes that "it would be . . . an unusual extension of normal principles of evidence if the Respondent were required to prove that a transfer did not happen." *Collier* states:

> A more appropriate reading of [Rule 6001] would place the burden of proof on the defendant only as to the last element, that the transfer was authorized under the Code or by the Court. This result is consistent with the language of the Rule providing that the entity asserting the "validity of a transfer" has the burden and reads into the Rule what is unsaid, but surely implied: the entity asserting the validity of transfer bears the burden of proof on the issue of validity of the transfer, and not necessarily on all other issues.

COLLIER ON BANKRUPTCY ¶ 6001.01[2]. Placing the burden of proof on the defendant as to whether a transfer occurred, whether it was property of the estate or whether it was made post-petition, would impermissibly shift the burden of proof from the moving party.

Petitioner had to show below that there was (1) a transfer (2) of property of the estate (3) made post-petition. *In re James B. Downing & Co.*, 74 B.R. 906, 908 (Bankr. N.D. Ill. 1987) (plaintiff bears the burden of proof on the issue of whether the transfer was property of the estate). Petitioner cannot meet this burden. Petitioner has no evidence when the Instant Tickets in its possession were sold. It simply cannot establish that the Instant Tickets it activated pre-petition were actually sold pre-petition. Pet. App. B 9a; Pet. App. C 25a. If the tickets were sold post-petition, not even Petitioner would argue that the cash proceeds were not trust funds of Respondent. Because Petitioner cannot produce evidence that the tickets were sold pre-petition, it cannot meet its burden of proof that the funds it voluntarily transferred to Respondent post-petition were property of the estate. Further, while not expressly stated in the conclusions of law below, Respondent notes that, even if the transfers in this case involved property of the estate, which they clearly do not, they would not be avoidable under 11 U.S.C. § 549 because they were authorized by the Bankruptcy Court. Pet. App. B 10a-12a; Pet. App. C 25a-26a.

II. The Eleventh Circuit Did Not Commit Error In Affirming the District Court's Determination that the Funds Paid to Respondent Were Held in Trust For Respondent As This Case is Controlled by *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990).

A. The Decisions Below Properly Follow *Begier*

In deciding this case, the Bankruptcy Court and the District Court relied on this Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990). In doing so,

the Bankruptcy Court determined that the funds voluntarily transferred by Petitioner to Respondent, including those funds deposited by the Petitioner into the Lottery Trust Account and swept by Respondent, were subject to a statutory trust. Pet. App. C 28a, 35a. The District Court agreed with the Bankruptcy Court's analysis and conclusions, including its reliance on *Begier*. Pet. App. B 15a. The Eleventh Circuit affirmed without opinion. Pet. App. A. There is no reason to grant certiorari in this case. The decisions of the three Courts below are entirely consistent with *Begier*.

There is no question that a statutory trust exists as recognized by the Courts below and every other court to have considered the relationship between Respondent and retailers of its tickets. *Grady County*, 253 Ga. App. at 787; *Daniel*, 225 B.R. at 251-52; *Thompson*, 296 B.R. at 566. There is also no question, as determined below, that the funds were voluntarily transferred to Respondent. Pet. App. B 18a; Pet. App. C 35a-36a.

In *Begier*, this Court conducted an in-depth analysis of an avoidance action wherein the payments sought to be recovered for the debtor's estate were made on account of a statutory trust obligation of the debtor for the benefit of the Internal Revenue Service ("IRS"). The trust funds included both withholding and excise taxes. In *Begier*, an airline fell behind in its pre-petition trust fund tax payments to the IRS and was ordered by the IRS to deposit all future taxes into a separate bank account. 496 U.S. at 56. The airline established the account, but failed to deposit all trust fund tax payments into that account: instead, the airline remained current on its obligations by paying the taxes both from the separate bank account and from commingled funds in its general operating accounts. *Id.* The airline filed for bankruptcy relief under Chapter 11,

the case was converted to Chapter 7 and the bankruptcy estate's trustee subsequently brought a preference action under 11 U.S.C. § 547 to recover the amount paid by debtor within the 90 days preceding the bankruptcy filing, including the tax payments made out of commingled funds in the airline's general operating accounts. *Id.* at 56-57.

This Court began its analysis by stating the general proposition that "if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated." *Id.* at 58. In conducting an examination of Section 547 of the Bankruptcy Code, this Court found that if the debtor does not own an equitable interest in property he holds in trust for another, that interest is not "property of the estate" as is defined in 11 U.S.C. § 541 and as applied in 11 U.S.C. § 547. *Id.* at 59 n.3.

Focusing on the language of the IRS Code creating a trust for the amount of taxes collected or withheld, this Court found that a trust arose when a person collected a tax for the IRS. *Id.* That trust applied to the amount of money collected rather than to an identifiable *res* as required under a common law trust. *Id.* at 62-64. Therefore, the trust arose when a person collected funds for the IRS regardless of whether the collector segregated the funds from its other assets. *Id.* at 60-61. As stated by this Court:

> The fact that [the debtor] neither put the taxes in a segregated fund nor paid them to the IRS does not somehow mean that [the debtor] never collected or withheld them in the first place. Mandating segregation as a prerequisite to the creation of a trust under § 7501 [of the IRS Code] would make § 7512's requirement that funds may be segregated in special and limited circumstances superfluous

> and would mean that [a debtor] could avoid the creation of a trust simply by refusing to segregate.

Id. at 54.

This Court then turned to the issue of whether the assets used by the debtor to pay the IRS were assets belonging to the trust. *Id.* Because the statutory trust was in the amount collected or withheld as opposed to a trust *res* under a common law trust, common law tracing rules were determined by this Court to be unhelpful in this analysis. *Id.* at 62-63. Relying on legislative history in the 1978 revision of Bankruptcy Code, this Court found that the IRS would have to show some nexus between the statutory trust and the assets to be applied to the debtor's trust fund obligation. *Id.* at 65-66. The House Report, on which this Court relied, stated, in pertinent part:

> A payment of withholding taxes constitutes a payment of money held in trust . . . if they have been properly held for payment, as they will have been if the debtor is able to make the payments.

Begier, 496 U.S. at 66, *quoting*, H.R. Rep. No. 95-595, p. 373 (1977), *U.S. Code Cong. & Admin. News*, 1978, p. 6329. This Court recognized that the "limitation that the funds must 'have been properly held for payment' is satisfied 'if the debtor is able to make the payments.'" *Id.*

This Court adopted a "literal reading" of the legislative history. The Court concluded that "[t]he debtor's act of voluntarily paying its trust fund tax obligation therefore is alone sufficient to establish the required nexus between the 'amount' held in trust and the funds paid." *Id.* at 66-67.

This Court also made it clear that the common law tracing rules did not apply to the case. This Court succinctly stated:

> In the absence of any suggestion in the Bankruptcy Code about what tracing rules to apply, we are relegated to the legislative history. The courts are directed to apply the reasonable assumptions to govern the tracing of funds.

Begier, 496 U.S. 53, 67. The House Report identified "one such assumption to be that any voluntary . . . payment of trust fund taxes out of the debtor's assets is not a transfer of the debtor's property." *Id.* Because the transfers to Respondent were voluntary payments of trust fund obligations, tracing rules are not applicable in this case, either.

Additionally, in *Begier*, this Court was explicit in its finding that a debtor who compromises the integrity of the trust by co-mingling funds in a general operating account in contravention of a statute directing otherwise will not be able to argue that those funds should be held to benefit the bankruptcy estate. *Id.* at 61.

Petitioner cannot successfully argue, as it continually attempts to do, that Lottery proceeds are subject to an avoidance action as property of the estate simply by advancing the argument that it commingled Lottery Ticket proceeds with funds in its general operating account. To do so is directly inconsistent with *Begier*, not to mention inconsistent with the Petitioner's contract with Respondent, the Bankruptcy Court orders and the requirements of Georgia law. Petitioner's own counsel acknowledged the existence and integrity of this trust before the Bankruptcy Court at the February 13, 1997 hearing when the Petitioner sought to assume its contracts with Respondent when he recognized

that the funds in the Lottery Trust account were the property of the Respondent. Pet. App. B 11a.

Petitioner argues that *Begier* does not apply to post-petition transfers. This Court's analysis in *Begier* is clear that its reasoning applies to post-petition transfers. 496 U.S. at 65. The Courts below recognized that the analysis is the same. Pet. App. B 17an.b; Pet. App. C 29a-30a.

The legislative history that formed the basis for the *Begier* decision included, *inter alia*, the following comment of Representative Edwards:

> The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and the tax authorities, can demonstrate that the amounts of withheld taxes are still in the possession of the debtor *at the commencement of the case*.

496 U.S. 53, 64 (1990), quoting 124 Cong. Rec. 32392, 32417 (emphasis added). This Court stated that the "context of Representative Edwards' comment makes it plain that he was discussing whether a *post-petition* payment of trust fund taxes involved "property of the estate." *Id.* at 65 (emphasis added). The comment necessarily concerned a post-petition payment of a pre-petition obligation, otherwise Representative Edwards would not have mentioned funds being held "at the commencement of the case." This Court also applied Representative Edwards' comments to a pre-petition transfer and specifically concluded that "the same reasonable assumptions therefore apply in both [pre- and post-petition] contexts." *Id.*

It is important to note, as this Court did in *Begier*, that the legislative history relating to a determination of whether trust funds were considered "property of the

estate" was spurred by this Court's 1971 decision in *United States v. Randall*, 401 U.S. 513 (1971). In *Randall*, this Court refused to enforce a statutory trust to authorize a voluntary post-petition transfer to discharge a trust fund tax obligation that the debtor had incurred pre-petition. The revisions to the Bankruptcy Code in 1978 were intended to overrule *Randall*. *Begier*, 496 U.S. at 63-65.

Accordingly, the District and the Bankruptcy Courts' reliance on *Begier* in reaching their conclusions in this case was well placed because *Begier* clearly recognizes that, for purposes of determining whether trust funds are property of the estate, the analysis is the same whether the transfer at issue was post-petition or pre-petition. *Begier*, 496 U.S. at 63-65.

Petitioner also argues that *Begier* is inapplicable because it deals with a specific federal tax statute. Again, as correctly noted by the Bankruptcy Court and the District Court, the issue in this case is whether the funds voluntarily transferred to the Lottery were "property of the estate." Pet. App. B 19a; Pet. App. C 29a-30a. As the Bankruptcy Court correctly noted, the fact that *Begier* dealt with a specific federal IRS statute is "inconsequential in this analysis." Pet. App. C 29a. The District Court noted that the IRS statute at issue in *Begier* is "remarkably similar" to the Lottery Act. Pet. App. B 16a.

Similarly, for example, when a person or entity collects an excise tax from a customer, that person or entity is in possession of the trust fund just like a Lottery Retailer is in possession of trust funds upon collecting the proceeds from the sale of a Lottery ticket. The Lottery Act expressly provides that upon the deposit of those funds in a bank account, the funds become property of the Lottery.

O.C.G.A. § 50-27-21(b). The breadth of the trust goes beyond the deposit into the separate trust account that may be required of a retailer, but extends to proceeds deposited into any bank account.

B. There Is A Reasonable Nexus Between The Funds Collected And The Funds Transferred.

Petitioner seeks to utilize *In re Wendy's Food Sys., Inc.*, 133 B.R. 917 (Bankr. S.D. Ohio 1991), in arguing that no "reasonable nexus" existed between the pre-petition trust and the funds swept post-petition because the balance in its bank account on the petition date was allegedly zero. As correctly noted by the Bankruptcy Court in this case, *Begier* held that "the conclusive presumption arises upon voluntary payment, regardless of the source of the payment and regardless of any intervening balance in the debtor's operating accounts." Pet. App. C 34a. In addition, Respondent disputes Petitioner's contention that it did not have any funds in its accounts on the petition date. Petitioner's own motion to use cash collateral in its bankruptcy case stated that it had about $330,000 in its accounts on the petition date.

The *Wendy's* decision incorrectly concluded that *Begier* found there are three elements, instead of two, that a taxing authority must satisfy in order to show that the trust funds were not property of the estate: (1) the debtor must collect or withhold the taxes, (2) the debtor must make a voluntary payment to the taxing authority and (3) that a reasonable nexus exists between the first and second elements. *Id.* It is this last requirement that *Wendy's* added to *Begier*. The Bankruptcy Court rejected the *Wendy's* decision. Pet. App. C 34a.

As seen above in *Begier* and as noted by the Bankruptcy and District Courts in their Orders, this Court found that a voluntary payment to the taxing authority *alone* is sufficient to establish the requisite nexus. Pet. App. B 18a; Pet. App. C 34a. Courts do not have to consider whether there was a nexus between the trust funds and the voluntary payment, such as whether the accounts from which the funds were paid contained sufficient funds at different points in time to meet the obligation. If that was a factor, this Court would not have found that the voluntary payment cannot be avoided *"regardless of the source of the funds,"* or that the voluntary payment *"alone"* was sufficient to establish the "required nexus." *Begier*, 496 U.S. at 66-67. (emphasis added). If something else was required, such as an analysis of the balances in the account at various points in time, then the voluntary payment would not "alone" be sufficient and the source of funds would have been relevant. Petitioner's reliance on *Wendy's* is misplaced in seeking to have this Court grant a writ of certiorari. Petitioner is essentially arguing that because a decision of the Eleventh Circuit did not follow an erroneous bankruptcy court decision in *Wendy's*, a writ of certiorari is appropriate. This argument is pointless.

Respondent notes that *Wendy's* has not been followed by other courts. In *In re Wellington Foods*, 165 B.R. 719 (Bankr. S.D.Ga. 1994), which is cited by the Bankruptcy Court in this case, the Bankruptcy Court for the Southern District of Georgia specifically stated " . . . I cannot agree with [the *Wendy's*] Court's analysis because it adds an element to the requirements of *Begier* which is not contained in the Supreme Court's opinion." 165 B.R. at 726. Therefore, the recipient of the trust funds is not required to show that the debtor made a voluntary payment of trust

funds *and* additional evidence showing that the reasonable nexus exists between the creation of the trust and the payment. *Id.* To the contrary, the fact that the voluntary payment occurred conclusively establishes the requisite nexus.

C. The Payments Are Conclusively Presumed to Be the Funds Held In Trust for Respondent.

Petitioner broadly asserts that the voluntary payments to Respondent from Petitioner's Georgia Lottery Trust Account are somehow presumed to be from the general assets of the estate. This is directly contrary to this Court's determination in *Begier* indicating that a voluntary payment alone creates the required nexus. 496 U.S. at 67.

In support of its broad assertion regarding a presumption that payments were from general assets, Petitioner cites *Bison Heating & Equipment, Inc. v. New York State Department of Taxation & Finance*, 177 B.R. 785 (W.D.N.Y. 1995). The *Bison* decision has nothing to do with this case. In *Bison*, the parties did not dispute that the bankruptcy trustee had a valid claim under 11 U.S.C. § 549. 177 B.R. at 787. Thus, *Bison* focuses not on the merits of a § 549 claim, but is largely directed to an analysis of sovereign immunity. 177 B.R. at 788-89. *Bison* is irrelevant to the determination of whether to grant a writ of certiorari in this case.

D. There Is No Requirement That a Trust *Res* Be Identified.

The funds paid to Respondent were held in trust by Petitioner for Respondent. Petitioner broadly argues that the payments in this case were made by a debtor-in-possession rather than the actual party to the agreement with Respondent. Petitioner also asserts that the funds

paid to Respondent were from post-bankruptcy funds, but on account of pre-bankruptcy sales.

There are several key facts that are relevant here. First, neither party has business records to show whether tickets activated pre-bankruptcy were actually sold pre-bankruptcy. Pet. App. B 9a; Pet. App. C 25a. Second, most of the funds paid over to Respondent were deposited into the Petitioner's Lottery Trust bank account. Pet. App. B 8a-9a; Pet. App. C 24a-25a. Such deposits were certainly the property of Respondent at the time that they were deposited. O.C.G.A. § 50-27-21. There is no question as to this issue. As a matter of contract, Bankruptcy Court order and Georgia law, the funds were clearly the property of the Respondent at the time of deposit. Pet. App. B 12a.

Petitioner argues that any post-petition transfers to the Georgia Lottery were not from Lottery ticket proceeds. Petitioner has no evidence to support this contention. The allegation used to support this argument appears to be that no designation was made by Petitioner that the amounts transferred to the Lottery were trust funds because deposits to the Petitioner's Lottery Account were made from the general, commingled post-petition account of the Petitioner. This argument is contrary to *Begier* for at least two reasons. First, *Begier* held that payment from a commingled account is irrelevant to the analysis. 496 U.S. at 60-61. Second, *Begier* held that the debtor basically designates the funds as trust funds by making the voluntary payment on account of the trust obligation. 496 U.S. at 66-67. There is a good reason for accepting the debtor's designation: who better than Petitioner, the party who collected the proceeds from the sale of the tickets, to contemporaneously designate what funds in its possession are trust funds by making voluntary transfers to the

Lottery. Now, six years later, after the officers and records are gone, Petitioner's lawyers are trying to argue that the funds their client voluntarily transferred to Respondent, including those deposited into the Lottery Trust Account, were not trust funds even though their client paid them on account of a trust fund obligation.

Petitioner made its decision, more than seven years ago, that these were trust funds both in its arguments to the Bankruptcy Court and its agreements with Respondent in 1996 and early 1997 and in practice by the making of voluntary transfers in the ordinary course of business pursuant to court orders, State law, and contract. Given that Petitioner acknowledges that it has no evidence that the funds transferred to the Lottery post-petition were not from post-petition ticket sales, it was ridiculous for it to ask a court more than six years later to disturb the ordinary and court approved business relations between the parties by re-characterizing the voluntary transfers to Respondent, including deposits into the Lottery Trust Account, to be something other than the Respondent's trust funds. All of the Courts below rejected Petitioner's arguments. It is likewise ridiculous for Petitioner to ask this Court to grant a writ of certiorari.

Petitioner's reliance on *In re Sunrise Paving, Inc.*, 204 B.R. 691, 692 (Bankr. D. Md. 1996), to establish the position that the Georgia Lottery must identify the trust *res* is misguided. In *Sunrise Paving*, the debtor wrote a check pre-petition to the IRS for the payment of FICA employment taxes. *Id.* at 693. The check, however, never cleared the bank. *Id.* When the IRS moved to recover the funds from the Debtor on the theory that the funds were held in trust for the IRS, the Bankruptcy Court, while acknowledging that a trust existed in favor of the IRS,

declined to order that the funds be transferred to the IRS because there was no voluntary payment since the check never cleared and there was a potential third-party secured claim against the funds in the account from which the check was issued. *Id.* In the instant case, Petitioner's transfers to Respondent were voluntary and Petitioner knew and acknowledged at that time that a trust for the benefit of the Respondent existed. Petitioner agreed with that conclusion. Its counsel agreed with it. The Bankruptcy Court acknowledged there was a trust relationship. It was, therefore, specifically understood by Petitioner and its lender, which asserted an interest in Petitioner's cash, that the lender had no claim to the funds transferred to Respondent. If the lender asserted a claim to these funds, it would have never consented to Petitioner's disbursement of $215,000.00 per week to the Lotteries of Georgia and Florida as part of the first authorization to use cash collateral. As such, there can be no doubt that a trust existed for the benefit of Respondent. *Sunrise Paving* is inapplicable to the instant case.

E. Respondent Does Not Have to Establish Tracing.

The "lowest intermediate balance" rule suggested by Petitioner is simply a mechanism used to determine the amount of funds held in trust when a court determines that tracing commingled funds is necessary. Under *Begier*, Respondent has no duty to trace funds commingled by Petitioner in contravention of state law. The transfers in *Begier* came from general, commingled accounts. 496 U.S. at 67. The funds were Respondent's property and were voluntarily transferred to Respondent.

III. The Decisions In This Case Do Not Undermine Federal Bankruptcy Court Jurisdiction.

Petitioner asserts that the decisions of the Courts below will have some great impact on the operation of bankruptcy courts and the administration of bankruptcy estates. Petitioner's assertions are overblown in that they greatly overstate the impact of the decisions below. The same concerns that Petitioner asserts will result from the inability to avoid the voluntary transfers in this case would also apply to the transfer that could not be avoided in *Begier*. *Begier* has been in place since 1990 without the resulting negative impact predicted by Petitioner. The simple fact is that the jurisdiction of bankruptcy courts to order the avoidance of transfers does not apply to property that is not property of the bankruptcy estate. With regard to the concern voiced by Petitioner, there is no meaningful difference between the avoidance powers under 11 U.S.C. § 547 and 11 U.S.C. § 549. Petitioner's argument that debtors-in-possession will pay over funds in order to avoid personal criminal sanctions arising from violation of "constructive trust" obligations would apply in pre-petition situations governed by 11 U.S.C. § 547 as well as post-petition situations governed by 11 U.S.C. § 549. Certainly, officers of debtors-in-possession could make decisions to pay trust obligations in order to avoid potential corporate as well as personal criminal or civil sanctions. If *Begier* and the decisions in this case lead to trust funds being voluntarily paid over to their rightful owners as occurred here, there is no harm, and likely a potential benefit, to the bankruptcy estate.

Further, speculation about potential impacts and consequences of a decision does not provide a reason for this Court to grant a writ of certiorari. The decisions below

are entirely consistent with this Court's precedent and do not conflict with precedent in any other Circuits.

IV. Respondent Is Not A General Unsecured Creditor of the Estate.

The only extent to which Respondent is a general unsecured creditor of Petitioner's bankruptcy estate is with respect to its pre-petition claim of $72,187.00. The funds paid over to Respondent were voluntarily paid. There is no dispute. The Courts below have consistently reached this conclusion. Pet. App. B 18a; Pet. App. C 35a-36a. The Petitioner held the funds in trust pursuant to O.C.G.A. § 50-27-21. The analysis of this case ends there.

Respondent also notes that the Petitioner and its estate benefited from the transfers. If Petitioner did not want to continue as a retailer post-petition, Petitioner could have simply ceased selling Georgia Lottery tickets when it filed its bankruptcy case and advised Respondent to pick up its property. That is not what Petitioner wanted. Petitioner never stopped selling tickets for even a moment. The primary focus of Petitioner's bankruptcy case was to find a buyer of its stores. Toward that end, Petitioner desperately wanted to assume the contracts with Respondent and, if assumption was not possible, Petitioner wanted to ensure that it could continue as a retailer of Lottery tickets during the case. Upon filing, Petitioner immediately sought to continue as a retailer for Respondent. Pet. App. B 10a-12a. There are a number of reasons the Petitioner sought to do so. First, Petitioner made direct income from selling Lottery tickets. After the filing of its bankruptcy, Petitioner sold in excess of $10,000,000 in Georgia Lottery tickets generating in excess of $600,000 in commission income to Petitioner.

Second, sales of Lottery tickets generated other sales for Petitioner. Customers came to Petitioner's locations to buy Lottery tickets and purchased other items while there. Third, the existence of an agreement with Respondent made Petitioner's stores more attractive to purchasers. Georgia Lottery equipment was already in place at the locations. Petitioner's personnel were familiar with Lottery equipment and selling tickets. Customers obviously associated availability of Lottery tickets with Petitioner's locations.

To obtain the benefits of being a retailer for Respondent, Petitioner agreed to comply with Respondent's rules and regulations, its contracts with Respondent, the Georgia Code and sought and obtained Bankruptcy Court orders authorizing it to do so. Only after Petitioner obtained those benefits and was able to sell its locations to a purchaser that instantly became a retailer of Georgia Lottery tickets did Petitioner suddenly decide it wanted to avoid the transfers. The simple fact is that Respondent entrusted Petitioner with tickets which Petitioner sold and collected the proceeds from such sales. Petitioner held the proceeds, like the tickets themselves, in trust, and voluntarily paid the proceeds over to Respondent. The proceeds thus paid over are clearly not property of the estate. Respondent is not an ordinary trade creditor that sold some form of goods to Petitioner. Respondent received its funds that Petitioner held in trust and that were in no way part of the estate. All of the Courts below agree with this result.

Respondent is not a general unsecured creditor to any extent beyond its claim of $72,187.00. The decisions below are entirely consistent with this Court's precedent and do not merit consideration by this Court.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Respondent prays that this Court decline to grant certiorari to review the decision of the Eleventh Circuit, as that decision is demonstrably in accord with this Court's decisions.

Respectfully submitted,

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